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Supreme Court, U.S.
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In The
Supreme Court of the United States

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HOWARD JAY KAPLAN,
Petitioner,
v.
MARY BERGHUIS, WARDEN,
Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

◆

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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November, 2004

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QUESTIONS PRESENTED

1. Whether the Petitioner's constitutional rights to due process under the Fourteenth Amendment were violated in a sexual assault case when the prosecutor did not immediately disclose, contrary to a discovery order previously entered, a medical finding by the prosecution's own expert that one of the alleged victims of the assault had a sexually transmitted disease.

2. Whether Petitioner's trial was so permeated with instances of judicial bias that Petitioner was denied his basic constitutional right to a fair trial decided by an impartial jury.

3. Whether the trial court's failure to determine the competency of the child complainants as well as the failure to hold an evidentiary hearing on Petitioner's allegations of improper investigative procedures resulted in admission of unreliable evidence in violation of petitioner's Fourteenth Amendment right to due process.

4. Whether the United States District Court applied an incorrect standard in determining whether

Petitioner's appellate attorney was ineffective by not raising numerous issues on his appeal as of right and which resulted in numerous procedurally defaulted issues.

PARTIES TO THE PROCEEDING

Petitioner:	Howard Kaplan, an individual.
Respondent:	Mary Berghuis, Warden.

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IN THE
SUPREME COURT OF THE UNTIED STATES

HOWARD JAY KAPLAN,
Petitioner,
v.

MARY BERGHUIS, Warden,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Howard Jay Kaplan, Petitioner, by undersigned counsel, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit is included in the Appendix at A1-A5 and is unreported. The Order Granting Certificate of Appealability of the United States District Court is included in the Appendix at B1-B3. The opinion of the United States District Court is included in the Appendix at C1-C47 and is unreported. The judgment of the United States District Court is included in the

Appendix at D1-D2 and is unreported. The Order of the Supreme Court of the State of Michigan is included in the Appendix at E1-E2 and is unreported. The opinion of the court of appeals of the State of Michigan is included in the Appendix at F1-F11 and is unreported. The amended opinion of the court of appeals of the State of Michigan is included in the Appendix at G1-G14 and is unreported.

JURISDICTION

Petitioner seeks review of the June 4, 2004 Order of the Sixth Circuit Court of Appeals in *Kaplan v. Berghuis*, Case No. 03-72662. Petitioner filed a timely Application to Extend Time for Filing Petition before this Court and said Application was granted. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner was charged and tried in the Oakland County (Michigan) Circuit Court on sixteen counts of first degree criminal sexual conduct, and eighteen counts of second degree criminal sexual conduct.

Prior to trial, the defense requested discovery, and the court entered an Order for Release of Information, which included the following provision:

> "IT IS HEREBY ORDERED that any and all medical reports and notes, psychological reports, including raw data, therapy reports and/or notes, school worker notes, school counselor notes, police counselor notes, and all notes from every source developed during interviews or conversations with the minor children, (victims names omitted) be released to counsel for Defendant forthwith."

The trial proceeded and the prosecution's theory was that petitioner had simultaneously and repeatedly molested his eight year-old daughter and three of her friends during sleepovers on nine separate occasions between September 11 and November 6, 1992.

During the presentation of the State's case, expert witness, Dr. Yvonne Friday testified regarding her physical examination of one of the child complainants. She testified her examination revealed findings of the sexually transmitted disease (STD) Gardnerella Vaginalis. The defense cross-examined Dr. Friday asking if the lab report she was testifying from was part of her original, as the defense never received a copy of the lab report. She responded that this lab report was part of the medical records dated 11/30/92, and that she had provided the entire report to the State. The filed "Pre-Sentence Investigation Report" also mentioned this particular complainant suffered from another STD, "Trichomoniasis Vaginalis".

Petitioner claimed that the prosecutor violated his constitutional right to a fair trial by withholding evidence of one of the complainants suffering from a STD during the time these sexual acts were committed. The trial court denied relief on the merits, finding the STD evidence not substantial enough to undermine the court's confidence in the outcome of the trial. On discretionary appeal from the trial court, both the intermediate appellate court and the state supreme court denied relief for petitioner's failure to present his constitutional claim on direct appeal. (App. E1-E2, F1-F11 and G1-G14).

Petitioner presented this claim in his habeas petition, and asserted that appellate counsel's failure to present this claim on direct appeal rendered his performance below that mandated by the Sixth Amendment, thereby establishing cause to excuse his procedural default. The Federal district court upheld the State appellate courts' decision. In determining whether appellate counsel was ineffective for failing to present this claim on direct appeal, the District Court held that this evidence was not substantial enough to change the outcome of the trial, therefore, counsel was not ineffective in failing to raise the claim on direct appeal. (App. C1-47). The district court also ruled that none of Petitioner's claims were "dead bang winners".

This was a lengthy seventeen-day jury trial, where 319 of the prosecution's objections were sustained and 55 were overruled. Of the defense objections, 22 were sustained and

89 overruled. When ruling on the prosecution's objections, the judge made comments such as: "Well, the objection is sustained and we're saving you the trouble"; "Well, we'll allow him the answer to this one"; "Well, we're sustaining the objection", etc. When ruling on defense counsel's objections, the judge made comments such as: "We will overrule the objection", "Well, we're allowing this in. The objection is overruled. It will be received", etc. and when a state witness made a statement beyond the question asked by defense counsel, counsel asked the court to have the statement stricken. The judge responded, "We'll let it stand".

Department of Social Services (DSS) worker, Michael Hurroun, and Detective Brackett were the lead investigators in the case. During cross-examination of Mr. Hurroun, the defense inquired why his report and the report of Detective Brackett were verbatim? The prosecutor objected, and the court asked the purpose of the question. Defense counsel responded that this line of questioning was for impeachment purposes as the reports were verbatim and that the interviewers were intermeshing their reports and that the information was in the same sequence in the paragraphs word for word. The prosecutor countered and stated "this is just absurd", and yelled, "I mean, if the truth hurts, too bad." The trial court then commented, "the fact that there might be instances that seem the same - from different sources might be because they're true." When defense counsel was cross-examining Detective Brackett regarding these verbatim reports, the prosecutor objected and the court responded, "let's stop the pontificating of that report and just ask questions".

During trial, the court admonished defense counsel on several occasions. In questioning Dr. Faller, defense counsel pointed out her untruthful answers to his questions in an attempt to show the bias of this witness. The Prosecutor objected by stating, "Judge, this is outrageous behavior ... I'd ask he be held in contempt of court". The court responded, "We're going to put you in contempt. You might go across the street," and later during cross-examination of this witness, the court warned defense counsel, "if you can't behave like an attorney, you shouldn't be here".

Other incidents occurred such as when counsel asked for a few minutes to speak with co-counsel, the judge responded, "You'd better do something."

After the close of proofs, the jury deliberated and returned with a verdict of guilty on all counts. Petitioner appealed as of right were he raised various constitutional claim relevant to this petition. Petitioner asserted that the trial court was biased and deprived him of a fair trial in violation of the Fourteenth Amendment. Petitioner based his claim on the judge's statement regarding the verbatim reports of the investigators. The Michigan court of appeals held that the court's comment could not be characterized as an expression of the court's opinion regarding the credibility of the testimony that unduly influenced the jury, and moreover, any prejudice was overcome by the trial court's instructions to the jury directing it to disregard any of the court's comments or rulings. (App. F1-F11 and G1-G14).

The Michigan Supreme Court denied relief for petitioner's failure to persuade the court that the issues should be reviewed. (App. E1-E2).

Petitioner raised this judicial bias claim in his habeas petition where he asserted that the judge's comments regarding the similar reports, coupled with the above-mentioned judicial comments, admonishments of counsel and rulings, permeated the trial with an appearance of partiality. The United States District Court found that these additional instances of alleged bias substantially altered the judicial bias claim to the point to where the state court was not given an opportunity to consider these claims; therefore, petitioner did not exhaust his state remedies. (App. C1-C47). In addressing whether petitioner was prejudiced for appellate counsel's failure to raise these additional instances of judicial bias, the District Court found that the facts and circumstances presented did not derive from an extrajudicial source, therefore, they do not support a judicial bias claim in light of this Court's decision in *Liteky v. United States*, 510 U.S. 540, 555 (1994). (App. C1-C47).

The District Court granted petitioner a certificate of appealability on all of the Constitutional claims presented. In its opinion denying relief, the Sixth Circuit Court of Appeals noted that the District Court gave a merit review of petitioner's claims, and held that the District Court's conclusion was satisfactory for the Court of Appeals to deny relief. (App. A1-A5).

REASONS FOR GRANTING THE PETITION

I.

It is petitioner's position that the prosecution's failure to disclose evidence of one of the child complainant's suffering from a sexually transmitted disease (STD) during the period these alleged acts occurred, without any of the other complainants nor petitioner contracting the STD, was material evidence that should have been disclosed prior to trial to allow the defense the opportunity to rebut the state's position that petitioner committed the numerous sexual acts simultaneously with the children over a period of 2 months. The prosecution's failure to disclose this evidence violated his due process rights, especially in light of the trial court's pre-trial order for complete disclosure of the medical records pertaining to the children, and of the prosecution's use of such evidence during mid-trial to prove sexual abuse occurred. Had this evidenced been disclosed to the defense, it could have introduced evidence of the high risk of asymptomatic transmission of this particular STD, and proved that these acts simply could not have occurred without any of the other complainants nor petitioner contracting this disease.

The respondent's position is that the STD evidence was neither exculpatory nor material to petitioner's guilt, and therefore did not deny petitioner due process. The respondent, relying on the Sixth Circuit opinion in *Norris v.Schotten*, 146 F.3d 314, 334 (6th Circuit 1998), further claims that even if the STD evidence was exculpatory, the Brady rule applies only to the complete failure to disclose, not to a tardy disclosure, and that the state's expert witness testifying at trial about the complainant having a STD was sufficient disclosure, since disclosure need not precede trial, and that Brady is a disclosure rule, not a discovery rule.

Petitioner presented this claim on collateral review. To establish cause for his failure to raise the claim on direct appeal, he asserted an ineffective assistance of appellate counsel claim. The District Court gave a merit review of the claim to determine whether appellate counsel was ineffective for failure to present the claim on direct appeal. The District Court found that the alleged suppression of the STD evidence would not have resulted in a different result, as the evidence of guilt was overwhelming. Therefore, appellate counsel was not ineffective for failure to raise this claim on direct appeal. The Sixth Circuit found that the District Court's rationale sufficient for the Court to deny petitioner relief.

This Court should grant certiorari to determine whether STD evidence is material in a sexual assault prosecution of a defendant. The opinions in this case are in conflict with opinions from other courts on the question of whether STD evidence is material in a sexual assault prosecution. Compare *Reece v.State*, 192 Ga.App. 14, 16, 383 S.E.2d. 572 (1989); *Chambers v. States*, 205 G.A. 78, 79(4), 421 S.E.2d 326 (1992) (in prosecution for incest and child molestation, trial court erroneously excluded evidence that the victim tested positive for sexually transmitted disease); *White v. State*, 201 G.A. 53(1), 410 S.E.2d 441 (1991).

It should be clear that in a sexual assault case such as this, evidence of a highly contagious STD is highly probative if not determinative to the guilt or innocence of a defendant. Using the same rationale on how the prosecution uses an STD to obtain a conviction, the fact that one of the alleged victims had an STD during the period these alleged acts were to have occurred, without any of the other complainants or petitioner having contacted the disease, is material evidence the defense could have used to prove these alleged sexual acts never occurred. However, without disclosure prior to trial, the defense did not have an opportunity to prepare for and present this defense and merely proceeded to trial challenging the credibility of the witnesses. As petitioner demonstrated through the scientific evidence presented in his lower court briefs, the defense could have proved the high risk of asymptomatic transmission of this particular STD, and that none of the other complainants nor petitioner had contracted the disease.

This Court has consistently held that disclosure should be made to allow the attorney to present a defense. "When a prosecutor receives a specific and relevant request, the failure to make a response is seldom, if ever, excusable" *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2329, 49 L.E.D.2d 490 (1995), as the prosecution has an affirmative duty to disclose evidence favorable to the defendant and suppression of favorable evidence that is material is a due process violation. *Kyles v. Whitely*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Here, the suppression of this relevant Brady material prevented the defense an opportunity to rebut the truthfulness of these alleged sexual assaults, thereby effecting the jurors' deliberation and the outcome of the trial. *Arizona v. Fulminate*, 499 U.S. 279, 111 S.Ct. 1246, 1265, 113 L.Ed.2d 302 (1991).

This Court should grant certiorari to determine whether STD evidence known to a prosecutor in a sexual assault case should always be disclosed to the defense prior to trial. The granting of certiorari would also allow the petitioner an opportunity to present scientific evidence to this Court on the high risk of asymptomatic transmission of this particular STD.

II.

It is petitioner's position that repetitive comments from the bench such as: "we're saving you the trouble"; "We will overrule the objection"; "We're allowing this in"; "We'll allow him to answer this one"; "We're sustaining the objection"; "We'll let it stand"; and "We're going to put you in contempt"; coupled with the judge's admonishing of defense counsel in front of the jury: "We're going to put you in contempt. You might go across the street", and "If you can't behave like an attorney, you shouldn't be here"; to the bench's comments regarding the material reports of the investigating officers: "the fact that there might be instances that seem the same - from different sources might be because they're true", when defense counsel was challenging their credibility due to the reports being verbatim, permeated the trial with an appearance of partiality.

Petitioner also asserts that the legal rulings from the bench revealed favoritism toward the prosecution. Petitioner tabulated the objections raised by the prosecution and the defense. The results reveal 319 prosecution objections were sustained and 55 were overruled. Defense objections were sustained 22 times and overruled 89 times. Petitioner then submitted these results to a Chi-square analysis. Chi-square is a statistical procedure that is used to understand categorical data, as in this case. It makes it possible to determine whether an observed frequency is within or departs from theoretical or empirical expectations. (App. J1-J20). Chi-square compares the frequency of occurrence actually observed with the frequency expected by chance. It is a standard statistical procedure used widely throughout the scientific enterprise and is generally accepted statistical methodology. This same type of data is recognized and accepted in the judicial system as determinative in showing racial and/or sexual discrimination, potential bias in juror pools, and police profiling of minority groups. The results were:

Judge's Rulings

Objections (N = 485)

	State	Defense
Sustained	319	22
Overruled	55	89

$X^2 = 172$

$P < .001$

The probability of $P < .001$ is that assigned by the tables for a Chi-square of 10.83. This is the lowest probability contained in the statistical tables. The calculated Chi-square of 172 means that the actual probability of that result is incalculably much, much lower. This is an outcome that cannot be a chance result but is rather indisputable scientific data proving an extreme bias by the trial judge in favor of the state, coupled with the above comments and admonishments of counsel, reveal such a high degree of favoritism or antagonism as to make a fair judgment impossible.

The District Court held that the trial court's remarks did not derive from an extrajudicial source and therefore do not support a bias or partiality claim, and that the trial court's judicial rulings also do not constitute a valid basis for a claim of bias or partiality. The District Court's holding is in accord with the Sixth Circuit's consistent application of the "extrajudicial source rule" to claims of judicial bias. See *Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003) ("alleged bias must stem from an extrajudicial source").

Other circuit courts have held that the claims of judicial bias do not need to derive from an extrajudicial source, and facts which lead a reasonable person to be convinced the judge was biased is sufficient to support the claim. See *United States v. Robinson*, 635 F.2d 981, 984 (2nd Cir. 1980); *United States v. Castner*, 50 F.3d 1267, 1272 (4th Cir. 1995). These decisions are in accord with this Court's holding in Liteky where the Court clarified that "an extrajudicial source" is not the "only basis for establishing disqualifying bias or prejudice". The Court noted, "[a] favorable or unfavorable predisposition can also deserve to be characterized as bias or prejudice because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render a fair judgment." Liteky at 551 (citations omitted). Writing separately to concur in the judgment, Justice Kennedy, with whom Justice Blackmun, Stevens and Souter joined, agreed "with the Court insofar as it recognizes that there is no per se rule requiring that the alleged impartiality arise from an extrajudicial source." Liteky at 557.

The District Court was correct in holding that judicial rulings alone will not support a claim of bias or partiality. On the other hand, Liteky also observed that there may be circumstances in which unfair bias or prejudice may stem from judicial rulings, combined with surrounding comments which show a degree of favoritism or antagonism required to prove bias and prejudice when no extrajudicial source is involved. Liteky at 555. Therefore, the District Court's opinion in this case, and the Sixth Circuit's application of the "extrajudicial source rule", are not only in direct conflict with other federal circuit court decisions, but with this Court's decision in Liteky, and involves an important question of federal law that has not been, but should be, settled by this Court, as this claim of error seriously affects the integrity and public reputation of judicial proceedings.

III.

Prior to trial, the defense filed a motion with brief in support to strike tainted prosecution witnesses. The defense argued that repeated questioning of the children during numerous pretrial interviews tainted their memories to where their memories were now fabricated and inadmissible. The defense also argued that the children were too young or irresponsible to understand the requirements for truthfulness or they could not adequately distinguish between either truth or fantasy, leaving them incompetent to testify.

During the oral argument on the defense motion to strike tainted state witnesses, both the prosecution and the defense suggested an evidentiary hearing might be in order to determine whether the children's memories were in fact tainted due to improper investigative techniques. The trial court denied the motion without prejudice stating that the defense failed to present any evidence, and if the defense could present evidence, then the court would consider hearing another motion.

On the first day of trial prior to voir dire, the defense attempted to re open the motion with additional evidence. The trial court stated that it would withhold a decision on whether the children were competent to testify until after the court heard the testimony of the children.

Petitioner asserts first, that the trial court committed reversible error when it failed to determine the children's competency in accordance with law prior to their testifying; and second, that the trial court committed reversible error when it failed to conduct an evidentiary hearing to determine whether or not the children's memories were tainted from improper investigative techniques. Both errors, petitioner claims, violated his Fourteenth Amendment right to Due Process of Law.

Witness competency is determined in accordance with state law. *Lott v. C&W Trucking Inc.*, 15 F.Supp.2d 1167 (M.D. Ala. 1997); In Re: Nguyen, 211 F.3d 105, 108 (4th Cir. 2000). Michigan Rule of Evidence (MRE) states the general rule of competency of a witness. MRE 601 is identical to FRE 601. See *People v. Flowers*, 222 Mich App 732, 837(4) (1997).

At the time of Petitioner's trial MCL §600.2163, MSA §27A.2163, was the statute governing a child witness' competency to testify. This statute requires that when a child under the age of 10 years is produced as a witness, the court must ascertain whether the witness has sufficient intelligence and sense of obligation to tell the truth by engaging in the type of questioning mandated by the statute. See *People v. Burch*, 170 Mich App 772, 775 (1988). Absent a sufficient showing of intelligence and sense of obligation to tell the truth, a witness is not permitted to testify under either MRE 601 or MCL §600.2163. *People v. Meeboer* (After Remand) 439 Mich 310, 356 (1992). Therefore, "reliability" of any testimony by a witness under 10 years of age is cast into doubt and the trial court is required whether the particular child's cognitive ability extends to distinguishing true from false testimony and understands the importance of giving truthful testimony. Meeboer at 356 357. Here, the trial court found each child complainant under the age of 10 competent to testify after briefly questioning them about whether the trial court was wearing a hat.

The failure of the trial court to engage in the type of questioning mandated by the statute resulted in an abuse of discretion that amounted to unreliable testimony being admitted at trial, especially in light of the state's own witness, school counsel Carolyn Brown, testifying that she wasn't sure if one of the child complainants knew what telling the truth was or how to be honest with you.

Other further testimony revealed the children's inability to distinguish truth from false testimony, and/or their unwillingness to testify truthfully. When asked if she knew the difference between the truth and a lie, one child witness testified "[d]on't lie. Say that it happened instead of saying this didn't happen." When asked of this witness whether she always tells the truth, she responded "[n]ot always." This witness' testimony also reveals her unwillingness to tell the truth where, during trial, she testified that she called home and asked to spend another night so she could get more information on Petitioner so she could come to court and tell to get him in more trouble, but in her initial interview with investigators denied that anything occurred. Although this witness previously testified that she saw things happening to another one of the children, she admitted that she had never seen anything happen, she only imagined them. This witness also informed Detective Brackett that she saw acts while looking under the bedroom door, but then testified that this was not true.

Testimony from another child witness, displayed her unwillingness to tell the truth, when she denied being involved in sexual play, such acts her mother verified as true; and when she testified to only using the massager once in a sexual manner which other testimony revealed occurred on three to four occasions.

These are not just discrepancies in testimony, these are acts of intentionally giving misleading testimony, showing these witnesses didn't have the sense of obligation or willingness to tell the truth, making their testimony inadmissible, Meeboer, supra., which is the key focus of competency under MRE 601 and MCL §600.2163.

Where state or federal law provides that a competency determination must be made, failure to conduct an appropriate hearing denies a defendant's due process rights. *Sinclair v. Wainwright*, 814 F. 2d 1516, 1522 1523 (11th Cir. 1987) (competency of insane witness); *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 2667, 96 L.Ed.2d 631 (1987) (due process claim arising out of a defendant's exclusion from child competency hearing). After a defendant raises a colorable objection to the competency of a witness, the trial court must perform "a reasonable exploration of all facts and circumstances" concerning competency. Sinclair at 1523. The trial court's denial of Petitioner's request to make an offer of proof as to each witness' competency was contrary to law and resulted in admittance of unreliable evidence in violation of the due process clause.

As previously noted, the defense motion to strike tainted prosecution witnesses was also grounded in improper investigative techniques, tainting the children's memories to where their memories were fabricated and not their own. Both the prosecution and the defense recognized the need for an evidentiary hearing on this matter, and the trial court erred seriously when it failed to conduct a hearing as testimony during trial revealed that these child complainants had been subjected to repeated interviews by numerous individuals with a preconceived idea that petitioner was guilty.

In support of this assertion, the testimony revealed that counselor, Carolyn Brown, was the individual who played a central role in the initiation, development and investigative process, which led to petitioner's arrest. The record reveals a series of actions by Brown with child protection services, mental health professionals, and law enforcement throughout the process. Brown's involvement began the first week of September 1992, after a child complainant's grandparents called the teacher and informed her about the recent death of her mother. Soon afterward, petitioner met with Brown and provided her with facts she found to be alarming regarding his background. One such fact was that of his ex wife filing several complaints accusing him of sexually abusing his child.

After petitioner's contact with Brown, the chronology of Brown's actions shows an increasing focus on petitioner as the perpetrator of sexual abuse of the children. Her trial testimony includes her description of having therapeutic relationships during this period with three of the four children who eventually became the complaining witnesses, while knowing that they had another therapist who was treating them, but felt she needed to go beyond those normal school situations with which a school counselor deals. These actions demonstrate her readiness to contravene professional ethics that clearly and unequivocally hold that a therapist does not get involved in therapy with people who already have a therapist. It also poses the problem of adult social influence affecting the perceptions and memory of young children to shape and mold an allegation of improper behavior reflecting the bias of an adult. This is one of many reasons why MCL §722.628(6) prohibits school social workers from investigating allegations of abuse. Brown was aware she was not to investigate such matters; yet, Detective Brackett's report of 11/16/92 indicates that Brown was interviewing the complainants for several weeks regarding the allegations. Brown also refused to accept a Department of Social Service worker (Hurroun) advising her that there was not enough evidence to proceed at that point, and continued to conduct interviews and corrupt the children's minds until she obtained the disclosures she needed. Brown even went as far as to usurp the probate court's protective order prohibiting any further interviews with the children, and testified that the reason she violated the court order and interviewed one child was because that child was angry at the other children for telling and was threatening them. Such testimony was contrary to Brown's notes that stated that the other children were harassing her. It's important to note that it was during this interview that Brown testified the child made her initial disclosure.

Scientific evidence establishes that one of the most powerful contaminating adult social influence factor is the prior belief and assumptions of the adults seeking to get information from a child. In this case, Brown was not the only investigator with a preconceived opinion that petitioner was guilty. The testimony of the professionals testifying in this case makes it clear that there was a predisposition to believe the statements of the children. Mr. Hurroun testified that he came to believe petitioner was guilty from the first child interviewed. Dr. Faller's testimony not only mislead the jury into believing she was a licensed psychologist when she was no more than a social worker, but also revealed her bias to believe children's statements, as a valuator rather than an investigator of sexual abuse. Brackett and Hurroun's testimony showed their readiness to accept the allegations of the children as true without any effort to examine an alternative hypothesis or test the information gathered from the interviews. Both psychologists Ann Wiersma and Virginia North assumed from the beginning that petitioner had sexually abused the children.

The record strongly suggests that this preconceived opinion in petitioner's guilt led to improper investigative techniques which influenced the testimony of the child complainant's: Hurroun had already made up his mind early on that petitioner had sexual contact with one child complainant, and disclosed this information to the other child complainants when they were "not responding" with the disclosures he wanted from his questions. Brown also refused to accept no as an answer to her questions and used this technique during her interviews with the children to get the disclosures she thought the children should be giving, and both Hurroun and Brown would ask repeated questions after they denied any sexual misconduct, knowing full well that repeating a question would result in a child changing their answers.

Ann Wiersma, a psychologist, immediately began referring to petitioner as "the perpetrator" and treated one of the child complainants under the assumption that petitioner had molested her, and that, as part of the treatment, she must obtain further disclosures from the child. One child complainant was told he could trust the prosecutor but he could not trust defense counsel, and notes from psychologist Carol Daniels reveals that investigators erroneously informed another child complainant that petitioner had previously killed and molested other children.

Furthermore, investigators testified at trial that during interviews, certain children made specific disclosures on specific dates, but could not answer why these disclosures were not contained in their reports and notes from these interviews. Hurroun also couldn't explain why his report was verbatim to Brackett's report.

The record supports that these children were severely coached on what to say and how to act; one of the child complainants testified that he spoke to Brown prior to going to court to testify, and that he practiced his testimony with several people on several occasions, knew what adults wanted to hear when they asked him questions, and knew what he was supposed to say because he practiced his testimony with them. The child also testified that he was urged by his mother to make disclosures. Another one of the "victims" stated that she never watched any movies with any people taking their cloths off, however, after she was shown the investigator's report, she change her testimony and testified she did watch such type of movie and the movies name was Love Button. She testified the movie was boring because it showed people running and taking their cloths off. When this tape was played for the jury in open court, there were no people running with or without clothes.

These children were so severely coached that they began using adult appropriate terms as the investigation progressed to trial, from pee pee, private, private part and butt at the preliminary exam to vaginal area, vagina, vulva and rectum at trial. Ann Wiersma acknowledged the severity of coaching when she testified she had never seen a child do with exhibits what one of the child complainants had done.

All of these improper investigative techniques and pre trial influence inhibit rather than facilitate the search for truth, and result in unreliable evidence being admitted during trial, which is the same type of investigative action which resulted in the New Jersey Appellate Court's reversal of *States v. Michaels*, 642 A2d 1372, 1379 (NJ, 1994). The New Jersey Court relied on *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977), and *Idaho v. Wright*, 497 U.S. 805, 812 813, 110 S.Ct. 3139, 3145, 111 L.Ed.2d 638, 650 (1990), to reverse the convictions on improper interrogations of alleged sexual abuse victims.

This defense was recognizable, and the above facts reveal that there was ample evidence presented to require an evidentiary hearing in this matter. Therefore, the failure of the trial court to conduct such a hearing resulted in the admittance of crucial inculpatory evidence that should have been excluded absent a hearing as the evidence derived from unreliable sources in violation of the Fourteenth Amendment Due Process Clause. Manson and Idaho.

IV.

In his Petition, Petitioner raised the issue of ineffective assistance of state appellate counsel for failing to raise certain issues on direct appeal that resulted in "procedural default" of these issues thereby placing Petitioner in a difficult position regarding his petition for habeas corpus. Among these issues were Petitioner's additional allegations of judicial bias. The continual refrain is that Petitioner did not present new and reliable evidence of actual innocence. However, Petitioner has always maintained his innocence and, in addition, had he been able to present his analysis of judicial bias, this would have been demonstrated. He could only present the analysis post trial.

Moreover, the District Court stated that "none of the claims omitted on appeal was a 'dead bang winner'" citing *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995).

However, in *Neill v. Gibson*, 278 F.3d 1044 (10th Cir. 2001), the "dead bang winner" theory was discarded by the 10th Circuit as a standard for ineffective assistance of appellate attorney claims. The standard in reviewing these claims is "reasonable probability".

Given Petitioner's substantial and substantive claims, including the failure of the prosecution to timely turn over exculpatory evidence, judicial bias and the clearly improper investigative techniques, there indeed is a reasonable probability that Petitioner's claims would have resulted in a reversal of his conviction on appeal.

CONCLUSION

For these reasons, Petitioner Howard Kaplan asks this Court to grant this petition for writ of certiorari.

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No. 03-2175

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HOWARD JAY KAPLAN,)
Petitioner-Appellant,)
)
v.) **ORDER**
)
MARY BERGHUIS, Warden,)
Respondent-Appellee.)
)

FILED
June 4, 2004

Leonard Green,
Clerk

Before: **KEITH** and **CLAY**, Circuit Judges; **OBERDORFER**, District Judge.*

Howard Jay Kaplan, a Michigan prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

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* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

Following a jury trial, Kaplan was convicted of sixteen counts of first-degree criminal sexual conduct, eighteen counts of second-degree criminal sexual conduct, and habitual offender, fourth offense. The convictions arose from allegations that Kaplan sexually abused his eight-year-old daughter (complainant number one), and three of her playmates (complainants two through four) in his home during nine weekends in 1992. Kaplan was sentenced to twenty-two life terms and twelve thirty-five to eighty-five year sentences. The Michigan Court of Appeals affirmed Kaplan's convictions and the Michigan Supreme Court denied leave to appeal thereto. *See People v. Kaplan,* 586 N.W.2d 925 (Mich. 1998).

Thereafter, Kaplan filed a motion for relief from judgment, which the trial court denied. The Michigan Court of Appeals denied leave to appeal the trial court's decision because Kaplan had failed to establish entitlement to relief under Michigan Court Rule 6.508(D). The Michigan Supreme Court also denied leave to appeal for failure to establish entitlement to relief under Rule 6.508(D). *See People v. Kaplan,* 636 N:W.2d 527 (Mich. 2001).

Kaplan's habeas petition was filed on July 24, 2002. The grounds for relief read as follows:

I. The trial court's failure to determine the competency of the child complainants and its failure to hold an evidentiary hearing on whether improper investigative procedures tainted the children's memories resulted in admission of unreliable evidence in violation of Petitioner's Fourteenth Amendment right to due process.

II. Judicial bias left the jury with the impression of partiality which upset the balance between the state and the accused, denying Petitioner his Fourteenth Amendment right to a fair trial.

III. Erroneous evidentiary rulings deprived Petitioner of his Sixth Amendment right to confrontation and compulsory process to guarantee him his Fourteenth Amendment right to present a defense.

IV. Numerous instances of prosecutor misconduct, including the failure to disclose *Brady* material which effected counsel's performance, rendered the trial result unreliable in violation of Petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution.

V. Ineffective assistance of both trial and appellate counsel rendered Petitioner's trial and appeal result unreliable, in violation of Petitioner's Sixth and Fourteenth Amendment rights to a fair trial and appeal of right.

VI. The cumulative effect of the constitutional errors presented in this habeas petition, served to deprive Petitioner of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

The district court denied the habeas petition on the merits, and granted Kaplan a certificate of appealability on all issues.

Generally, we review de novo the district court's disposition of a habeas corpus petition. *See Payton v. Brigano,* 256 F.3d 405, 407-08 (6th Cir. 2001), *cert. denied,* 534 U.S. 1135 (2002); *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000). A writ of habeas corpus will not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" resulted in an unreasonable application of federal law or an unreasonable determination of facts based upon the evidence presented to the state courts. *See* 28 U.S.C. § 2254(d)(1) and (2). A federal court may not find a state adjudication to be unreasonable unless "the state court identifies the correct governing legal principle from [the United States Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v: Taylor*, 529 U.S. 362, 413 (2000). Thus, only when the state court's decision is "objectively unreasonable" should a writ of habeas corpus be issued. *Id.* at 409.

After a study of the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in dismissing the habeas petition. Because the reasons why relief should be denied have been fully detailed by the district court, the issuance of a detailed opinion by this court would be duplicative and would serve no useful purpose.

Accordingly, the district court's judgment is affirmed upon the reasoning set out by that court in the opinion and order filed August 1, 2003. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HOWARD JAY KAPLAN,
Petitioner,

v. **CASE NO. 02-72662**

MARY BERGHUIS,
Respondent.
______________________/

FILED
Sept. 24, 2003
Eastern District
of Michigan

ORDER GRANTING CERTIFICATE OF APPEALABILITY

This matter is before the Court on Petitioner's Application for Certificate of Appealability. An appeal may not be taken from the final order of a district court denying a motion filed pursuant to 28 U.S.C. § 2254 unless a certificate of Appealability issues. 28 U.S.C. § 2253 (c)(1)(A). in order to issue a certificate of Appealability, the district court must find that the Petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2).

This court finds that the Petitioner has made the required showing on the issues raised in his Application for Certificate of Appealability. Specifically, this Court certifies the following issues for appeal:

1. The trial court's failure to determine the competency of the child complainants and its failure to hold an evidentiary hearing on whether improper investigative procedures tainted the children's memories resulted in admission of unreliable evidence in violation of Petitioner's Fourteenth Amendment right to due process.
2. Judicial bias left the jury with the impression of partiality which upset the balance between the state and the accused, denying Petitioner his Fourteenth Amendment right to a fair trial.
3. Erroneous evidentiary rulings deprived Petitioner of his Sixth Amendment right to confrontation and compulsory process to guarantee him his Fourteenth Amendment right to present a defense.
4. Numerous instances of prosecutor misconduct, including the failure to disclose Brady material which affected counsel's performance, rendered the trial result unreliable in violation of

Petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution.

5. Ineffective assistance of both trial and appellate counsel rendered Petitioner's trial and appeal result unreliable, in violation of Petitioner's Sixth and Fourteenth Amendment rights to a fair trial and appeal of right.

6. The cumulative effect of the constitutional errors presented in the habeas petition served to deprive Petitioner of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

As such, petitioner's Application for a Certificate of Appealability is GRANTED.

/s/ Arthur J. Tarnow
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

Dated: September 24, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HOWARD JAY KAPLAN,
Petitioner,

v. **CASE NO. 02-CV-72662-**
DT

MARY BERGHUIS,
Respondent.
______________________________/

FILED
July 31, 2003
Eastern District
of Michigan

OPINION AND ORDER

I. Introduction

Petitioner Howard Jay Kaplan has filed a pro se habeas corpus petition under 28 U.S.C. § 2254. The habeas petition attacks Petitioner's state court convictions in Oakland County, Michigan for sixteen counts of first-degree criminal sexual conduct, MICH. COMP. LAWS § 750.520b(1)(a), and eighteen counts of second-degree criminal sexual conduct, MICH. COMP. LAWS § 750.520c(1)(a). The convictions arose from allegations that Petitioner sexually abused his eight year-old daughter (complainant number one), and three of her playmates (complainants two through four) in his home during nine weekends in 1992. Petitioner and his daughter denied the allegations of sexual abuse at trial. The defense theory was that biased investigators who repeatedly questioned the children during pretrial interviews tainted the children's memories to the extent that their memories were fabricated.

The trial court sentenced Petitioner as a fourth habitual offender to twenty-two terms of life imprisonment and twelve terms of thirty-five to eighty-five years in prison. The State Appellate Defender Office (SADO) represented Petitioner on appeal from his convictions.

SADO raised eight claims in its appellate brief

I. The trial court violated appellant's due process rights and abused its discretion in finding the child complainants competent to testify where the investigators deliberately failed to preserve evidence of pretrial interviews with the complainants.

II. The trial court abused its discretion and violated appellant's due process rights by improperly admitting the preliminary examination testimony of a child complainant to rebut a claim of recent fabrication where the child already had the opportunity to fabricate.

III. The trial court violated appellant's due process rights by sua sponte commenting that the similarity in investigative reports might reflect their truth.

IV. The trial court violated appellant's due process right to confront the witnesses against him by refusing to allow defense counsel to ask a complainant's mother whether the complainant ever told lies.

V. The trial court abused its discretion and violated due process in refusing to allow defense counsel to ask a complainant's mother about what a detective told her, where offered to establish confirmatory bias in questioning the complainant.

VI. The trial court abused its discretion in permitting the prosecutor to untimely endorse one witness and call a second witness for rebuttal where the delay irreparably prejudiced the defense.

VII. The trial court abused its discretion and violated appellant's due process rights by admitting similar acts evidence of appellant's conduct with an adult ex-girlfriend, as well as appellant's conduct with another child, where the prejudicial effect substantially outweighed the probative value.

VIII. The prosecutor violated due process and committed misconduct in closing argument by vouching for the credibility of witnesses and appealing to the civic duty of the jurors.

Petitioner raised two additional two claim in a *pro se* supplemental brief:

I. The trial court abused its discretion and denied Defendant's right of confrontation concerning the prosecutor's expert witness.

II. The misconduct of the trial judge crossed the line of impartial observer and controller of proceedings so as to

> slant the playing field in favor of the state and deny the defendant a fair and impartial trial.

The Michigan Court of Appeals initially affirmed Petitioner's convictions in an unpublished opinion that addressed only the claims raised by SADO. *See People v. Kaplan,* No. 172567 (Mich. Ct. App. Dec. 30, 1996). Petitioner then moved for a rehearing, and the court of appeals released an unpublished amended opinion in which it addressed the claims raised by both Petitioner and SADO. *See People v. Kaplan,* No. 172567 (Mich. Ct. App. May 30, 1997). All ten issues were presented to the Michigan Supreme Court in an application for leave to appeal. The supreme court denied leave to appeal, because it was not persuaded that the questions presented should be reviewed. *See People v. Kaplan,* 457 Mich. 883; 586 N.W.2d 925 (1998).

On July 7, 1998, Petitioner filed a motion for relief from judgment, which the trial court denied. On appeal from the trial court's decision, Petitioner argued that:

> I. Violative of the Sixth and Fourteenth Amendment of the United States Constitution was the prosecutor's misconduct in failing to disclose *Brady* material which effected

counsel's performance rendering the trial result unreliable.

II. Erroneous and misleading rulings of the trial court prevented counsel from presenting a meaningful defense, infringing upon defendant's Sixth and Fourteenth Amendment right to a fair trial.

III. The prosecutor violated due process and committed misconduct by vouching for the credibility and reliability of reports compiled by the state investigative agents regarding the statements of the complaining witnesses.

IV. Ineffective assistance of both trial and appellate counsel rendered defendant's trial and appeal result unreliable, violative of the Sixth and Fourteenth Amendment.

V. The "when to acquit" definition of beyond a reasonable doubt unconstitutionally reduced the prosecutor's burden of proof below that of utmost certainty; with the trial narrowing to a state of credibility, manifest injustice resulted.

The Michigan Court of Appeals denied leave to appeal the trial court's decision, because Petitioner had failed to establish entitlement to relief under Michigan Court Rule 6.508(D). *See People v. Kaplan,* No. 229190 (Mich. Ct. App. Apr. 26, 2001). The Michigan Supreme Court also denied leave to appeal for failure to establish entitlement to relief under Rule 6.508(D). *See People v. Kaplan,* 465 Mich. 914; 636 N. W. 2d 527 (2001).

Petitioner's habeas corpus petition was filed by the Clerk of Court on July 24, 2002. The grounds for relief read as follows:

I. The trial court's failure to determine the competency of the child complainants and its failure to hold an evidentiary hearing on whether improper investigative procedures tainted the children's memories resulted in admission of unreliable evidence in violation of Petitioner's Fourteenth Amendment right to due process.

II. Judicial bias left the jury with the impression of partiality which upset the balance between the state and the accused, denying Petitioner his Fourteenth Amendment right to a fair trial.

III. Erroneous evidentiary rulings deprived Petitioner of his Sixth Amendment right to confrontation and compulsory process to guarantee him his Fourteenth Amendment right to present a defense.

IV. Numerous instances of prosecutor misconduct, including the failure to disclose *Brady* material which effected counsel's performance, rendered the trial result unreliable in violation of Petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution.

V. Ineffective assistance of both trial and appellate counsel rendered Petitioner's trial and appeal result unreliable, in violation of Petitioner's Sixth and Fourteenth Amendment rights to a fair trial and appeal of right.

VI. The cumulative effect of the constitutional errors presented in this habeas petition, served to deprive Petitioner of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

Respondent urges the Court to deny the habeas petition on the grounds that Petitioner's claims lack merit, are procedurally defaulted, and are not cognizable.

II. **Standard of Review**

Section 2254(d) of Title 28, United States Code, imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). An "unreasonable application occurs" when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

III. Discussion

A. Competency of the Child Witnesses

Petitioner's first claim alleges that the trial court deprived him of due process by failing to determine the competency of the minor complainants before they testified. Petitioner also alleges that the trial court should have held an evidentiary hearing on whether improper investigative procedures tainted the children's memories and resulted in the admission of unreliable evidence. Petitioner asserts that the children did not possess a sense of obligation or a willingness to tell the truth. Petitioner also contends that the investigators were predisposed to believe the children's allegations and that their investigative techniques influenced the children's testimony.[1] The Michigan Court of Appeals concluded on review of Petitioner's claim that "the trial court did not abuse its discretion in permitting the children to testify after determining that they were capable of distinguishing the truth from falsity and that they were aware of their obligation to testify truthfully." *Kaplan*, Mich. Ct. App. No. 172567, at 2.

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[1] Petitioner is not arguing, as he did in state court, that the interviews should have been recorded on an audio or video tape.

Petitioner acknowledges that witness competency is determined under state law. His allegations that the trial court violated Michigan Rule of Evidence 601 and MICH. COMP. LAWS § 600.2163, regarding the competency of witnesses, is not cognizable here, because "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Federal habeas courts may grant the writ of habeas corpus only if the petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3) and 2254(a).

Nor does it appear that due process was violated in this case. The trial judge asked each of the four child complainants his or her name and age. The judge also inquired about the children's siblings, whether the children knew what it meant to tell the truth, whether the judge would be telling the truth if he said that he was wearing a hat, and whether the child intended to tell the truth. The children were eight years old when the alleged abuse occurred and nine years old at trial. The record indicates that the children were bright and articulate and that they had no reason to fabricate allegations of sexual abuse. Their allegations were not the type of statement that one would expect a child to fabricate, and Petitioner was not a stranger to them. Medical evidence was consistent with the girls' claims.[2]

The record also indicates that investigators limited the number of pretrial interviews and asked open-ended questions, as opposed to leading questions, during the interviews. Complainant number four disclosed the abuse in conversations with his mother, his psychologist, a detective and a Protective Services investigator at a joint meeting, his father, and his stepfather. He was told to tell the truth at trial, and his explanation of what happened was consistent throughout the case.

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[2] Dr. Annamaria Church testified that Petitioner's daughter had scar tissue around her vaginal opening. In addition, her hymenal opening was large for her size and age, and she had anterior tears in her hymenal tissue. Dr. Church opined that the child had chronic genital trauma, which was either self-inflicted or other-inflicted.

Dr. Church testified that the third complainant's hymenal tissue was somewhat thickened, a condition that could be normal or the result of chronic irritation or inflammation. Dr. Yvonne Friday testified that the second complainant's hymenal opening was abnormally large, an indication that something was placed in her vagina. She also tested positive for a bacteria found in sexually active women.

Complainant number three initially denied the sexual abuse out of fear that (1) she would lose the friendship of Petitioner's daughter, (2) Petitioner's daughter would be sent to a foster home, and (3) Petitioner would get in trouble. However, after complainant number four revealed what had happened to him, complainant number three disclosed the sexual abuse to her mother, her Sunday school teacher, the prosecutor, and school counselor. She also talked to Detective Jeff Brackett and May Kay Newman in a joint meeting and to psychologist Ann Wiersma. She admitted that she did not always tell the truth, but she denied that anyone had put words in her mouth.

Complainant number two testified that she had talked about the sexual abuse with a lot of people, including her parents, her therapist, Detective Jeff Brackett, Mary Kay Newman, and her best friend. She also testified, however, that no one had told her what she should say and that her testimony reflected what really happened, not what somebody told her to say.

Petitioner's daughter apparently was subject to the same type of investigative questioning as the other children. She steadfastly maintained at trial that her father did not sexually abuse her or anyone else.[3]

To summarize, the record does not support Petitioner's allegations that the children were incompetent or that biased investigators and excessive pretrial questioning influenced the children's testimony. The Court therefore concludes that the trial judge did not deprive Petitioner of due process by permitting the complainants to testify and by not conducting an evidentiary hearing. The state courts' denial of relief did not result in decisions that were contrary to, or unreasonable applications of, any Supreme Court decisions.

B. Judicial Bias

1. Comment on Similar Investigative Reports

Petitioner's second claim alleges that the trial court was biased and deprived him of a fair trial in violation of the Fourteenth Amendment. In reviewing claims of judicial bias, the Court looks to *Liteky v. United States,* 510 U.S. 540 (1994), for guidance. *Maurino v. Johnson, 210* F.3d 638, 645 (6th Cir. *2000).* The Supreme Court stated in *Liteky* that the words "bias" and "prejudice" "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate,* either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree . . . ." *Liteky,* 510 U.S. at 550 (emphasis in original).

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[3] According to Carolyn Brown, a school counselor, Petitioner's daughter informed her that Petitioner touched the child's vagina one time.

An unfavorable opinion of the defendant does not constitute bias or prejudice when the judge's "knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings . . . ." *Id.* at *550-51.* A favorable or unfavorable predisposition amounts to "bias" or "prejudice" only if "it is so extreme as to display clear inability to render fair judgment." Id. at *551.*Petitioner's allegation of judicial bias arose when defense counsel asked Michael Harroun why his report of an investigative interview was almost identical to Detective Jeff Brackett's report, which was based on a different interview. The prosecutor objected to defense counsel's questions. The trial judge sustained the prosecutor's objection, saying, "[T]he fact that there might be instances that seem the same . . . from different sources might be because they're true. I don't know... But I'm sustaining the objection . . . ." (Tr. Sept. 27, 1993, at 143).

The Michigan Court of Appeals opined that the trial court's comment was not an expression of the court's opinion regarding the credibility of the testimony. This Court agrees. The trial court was acknowledging the possibility that the reports were the same because they were true, but the court admitted that it did not know whether the reports were true.

Furthermore, as the court of appeals recognized, the trial court instructed the jurors that its comments and rulings were not evidence. The court also instructed the jurors that, when it made a comment or gave an instruction, it was not trying to influence the jurors' vote or express a personal opinion. The court said that, if the jurors thought the court had an opinion about how they should decide the case, they should pay no attention to the opinion; they should decide the case from the evidence. (Tr. Oct. 25, 1993, at 128).

The trial judge's comment did not reflect clear inability to render a fair judgment. Therefore, the state court's denial of relief did not result in a decision that was contrary to, or an unreasonable application of, *Liteky*.

2. Other Judicial Comments

Petitioner cites many other instances of alleged judicial bias, which he claims permeated the trial with an appearance of partiality and upset the balance between the state and the accused.[4] For example, Petitioner contends that the italicized words in the following comments indicate that the trial court allied itself with the prosecution:

---

[4] Petitioner calculates that 319 of 374 objections by the prosecution were sustained, but only 22 of 111 defense objections were sustained.

> "Let's stop the pontificating of that report and just ask questions." (Tr. Oct. 4, 1993, at 158);
>
> *"[W]e're* saving you the trouble [of laying out your question] (Tr. Oct. 18, 1993, at 137) (emphasis added by Petitioner);
>
> *"We* will overrule the objection. (Tr. Oct. 4, 1993, at 13) (emphasis added by Petitioner);
>
> *"We're* allowing [Petitioner's letter to his ex-wife] in. The objection is overruled. It will be received." (Tr. Oct. 22, 1993, at 6) (emphasis added by Petitioner);
>
> *"[Wle'll* allow him the answer to this [question]." (Id. at 97) (emphasis added by Petitioner);
>
> *"[W]e're* sustaining the objection." (Id. at 121) (emphasis added by Petitioner);
>
> "How do you get around that [objection]?" and, *"We'll* let it stand." (Tr. Sept. 17, 1993, at 19 and 23) (emphasis added by Petitioner).

Petitioner also complains of the following admonishments by the trial court to defense counsel:

> "We're going to put you in contempt. You might go cross the street." (Tr. Oct. 22, 1993, at 110);
>
> "You don't make statements like that. It's completely - not only unprofessional, but you're also going to be in contempt of the Court for making those comments . . . . Again, this entirely improper. If you can't behave like an attorney, you shouldn't be here." (Id. at 145); and
>
> "You'd better do something." (Id. at 110).

Finally, Petitioner contends that the trial court showed favoritism toward the prosecution by:

> (1) not admitting a document that proved what it asserted to be (Tr. Sept. 17, 1993, at 102), while denying defense counsel's objection to the introduction of a document which proved that which it asserted;
>
> (2) allowing prosecution witness to establish her expertise through a curriculum *vitae* (Tr. Oct. 22, 1993, at 46), but making it difficult for defense counsel to get its expert qualified (Tr. Oct. 8, 1993, at 117-18);

(3) allowing the prosecution's expert witness to complete an answer, but not providing the same courtesy to the defense expert (Tr. Oct. 8, 1993, at 183);

(4) sustaining the prosecution's objection to a question that she claimed had been asked and answered, even though defense counsel said he did not get an answer. (Tr. Sept. 24, 1993, at 170); and

(5) sustaining the prosecution's objection to hearsay without permitting defense counsel to cite authority for his position (Tr. Sept. 17, 1993, at 102).

a. Exhaustion of State Remedies

Petitioner did not assert these instances of alleged bias on direct review of his convictions or in state court collateral proceedings. By not raising these claims in state court, Petitioner violated the doctrine of exhaustion of state remedies, which requires state prisoners to present their claims to the state courts before raising their claims in a federal habeas corpus petition. 28 U.S.C. § 2254(b)(1)(A) and (c); *O'Sullivan v. Boerckel,* 526 U.S. 838, 842 (1999). The doctrine requires prisoners to present their habeas claims to the state courts under the same theory. *Lyons v. Stovall,* 188 F.3d 327, 331-32 (6th Cir. 1999); *Pillette v.* Foltz, 824 F.2d 494, 497 (6th Cir. 1987). "[M]ere similarity of claims is insufficient to exhaust." *Duncan v. Henry,* 513 U.S. 364, 366 (1995); *see Sampson v. Love,* 782 F.2d 53, 55 (6th Cir. 1986) (explaining that the state court must be given an opportunity to consider a claim when new facts or evidence presented in conjunction with a federal habeas petition places the claim in a significantly different posture).

Petitioner alleged a claim of judicial bias in his state court appeals. He has substantially altered his judicial-bias claim here by attacking the comments, admonishments, and rulings quoted above. Because the state court was not given an opportunity to consider these claims, the Court concludes that Petitioner did not exhaust state remedies for these claims.

b. Waiver Analysis

"Exhaustion is a problem only if the state still provides a remedy for the habeas petitioner to pursue, thus providing the state courts an opportunity to correct a constitutionally infirm state court conviction." *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994). Petitioner no longer has an available remedy to exhaust, because his only remedy is to file another motion for relief from judgment in the trial court. The Michigan Court Rules bar successive motions for relief from judgment, Mich. Ct. R. 6.502(G), and the only exceptions to the rule (retroactive change in the law or a claim of new evidence), are not applicable here. The

Court therefore deems the exhaustion requirement satisfied. The Court may adjudicate Petitioner's unexhausted claims only if he can show cause for not raising all his claims in state court and actual prejudice or a miscarriage of justice. *Gray v. Netherland,* 518 U.S. 152, 161-62 (1996); *Rust,* 17 F.3d at 160-62.[5]

Petitioner intimates that his appellate attorney should have raised his unexhausted claims on direct appeal. The Sixth Circuit recently explained that,

> [t]o show a violation of the Sixth Amendment right to counsel, clearly established Supreme Court precedent requires a defendant to demonstrate (1) that his or her attorney "made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that the attorney's deficient performance was so prejudicial that it deprive[d] the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To demonstrate that counsel's

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[5] The exhaustion and waiver rules "apply both to entirely new legal claims and new factual bases for relief . . . ." *Alley v. Bell,* 307 F.3d 380, 386 (6th Cir. 2002) (citations omitted), *petition for cert. filed (U.S.* May 19, 2003) (No. 02-10839).

> performance was deficient, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish that counsel's deficient performance was prejudicial, a defendant "must show that there is a reasonably probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Roberts v. Carter, _____ F.3d ___, ___, No. 01-3851, 2003 WL 21699471, at *3 (6th Cir. July 23, 2003).

Even assuming that appellate counsel was ineffective, Petitioner has not demonstrated prejudice as a result of the alleged judicial bias. He is not suggesting that the trial court's remarks derived from an extrajudicial source, and even if the remarks were characterized as critical, disapproving, or hostile to Petitioner, they do not support a bias or partiality claim. *Liteky,* 510 U.S. at 555. The trial court's judicial rulings also do not constitute a valid basis for a claim of bias or partiality. *Id.*

The record indicates that the trial judge was even-tempered and that his admonishments to defense counsel were based on counsel's habit of making inappropriate comments to witnesses. The trial judge did not berate defense counsel or the defense. In fact, he intervened very little in the case. Most of the conduct complained of occurred in response to the prosecutor's excessive objections. The trial judge may have been impatient at times, but "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish bias or partiality. *Id.* at 555-56.

Some of the court's comments and rulings served to move the case along. This conduct also is immune from claims of bias or partiality. *Id.* at 556. And although the trial judge ruled frequently in the prosecution's favor, the prosecutor's objections often were warranted. In short, the trial court's conduct did not reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555.

The remaining question is whether a miscarriage of justice will occur if the Court fails to review all Petitioner's claims of judicial bias on their merits. The exception for miscarriages of justice excuses a procedural default only in "the extraordinary case where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . . .'" *Hannah v. Conley,* 49 F.3d 1193, 1196 n.3 (6th Cir. 1995) (quoting *Murray v. Carrier,* 477 U.S. 478, 496 (1986)).

Petitioner maintained his innocence throughout the state court proceedings, but he has not presented the Court with new and reliable evidence of actual innocence. Therefore, the exception for miscarriages of justice does not apply, *Schlup v. Delo,* 513 U.S. 298, 326-29 (1995), and Petitioner's judicial-bias claims, with the exception of the comment on similar investigative reports, are procedurally defaulted and barred from substantive habeas review.

C. Evidentiary Rulings

Petitioner's third claim attacks the trial court's evidentiary rulings. Petitioner alleges that the trial court's erroneous rulings deprived him of his Sixth Amendment right of confrontation and compulsory process and his Fourteenth Amendment right to present a defense.

1. Procedural Defaulted Claims

Several of Petitioner's sub-claims about the trial court's evidentiary rulings were not raised in state court. Those sub-claims are not exhausted, and the Court deems those claims waived and procedurally defaulted for the reasons given above in Section III.B.2.b.[6]

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[6] The unexhausted claims concern (1) Michael Harroun's comments to Petitioner's daughter during an interview, (2) the notes of complainant number three to psychologist Ann Wiersma, (3) Detective Jeff Brackett's unresponsive comments during trial, (4) the alleged sexual encounter of complainant number two with a boy named Ben Ginser, (5) taped interviews of Petitioner's daughter, (6) the issue of

Other sub-claims are procedurally defaulted for different reasons. The doctrine of procedural default provides that,

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). In *Maupin v. Smith,* 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit set forth a four-part test for determining whether a prisoner's constitutional claim is procedurally defaulted and barred from habeas review. Courts must determine whether: (1) there is a relevant state procedural rule and whether the petitioner failed to comply with that rule; (2) the state courts actually enforced the state procedural rule; and (3) the procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal

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whether an abusive person would take his children to therapy, and (7) criminal histories of prosecution witnesses.

review of a constitutional claim; and (4) the petitioner has shown cause for not complying with the procedural rule and actual prejudice from the alleged constitutional error. *Id.* at 138.

a. Psychologist Virginia North

Petitioner alleges that the trial court deprived him of the right to confront psychologist Virginia North about her notes from interviews with one of the complainants. Michigan Court Rule 6.508(D) prohibits granting relief from judgment if a motion

> alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> > (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
> >
> > (b) actual prejudice from the alleged irregularities that support the claim for relief.

Mich. Ct. R. 6.508(D) (3) (effective October 1, 1989).

Petitioner violated Rule 6.508(D)(3) by not raising his claim about Virginia North on direct appeal from his conviction. He raised the claim for the first time in his motion for relief from judgment. The trial court adjudicated the claim on the merits, but the state appellate courts subsequently denied leave to appeal because Petitioner had failed to establish entitlement to relief under Michigan Court Rule 6.508(D).

Rule 6.508(D) was firmly established and regularly followed before Petitioner's 1993 trial and subsequent appeal.[7] And, despite Petitioner's assertion to the contrary, the brief appellate orders stating that Petitioner was not entitled to relief under Rule 6.508(D) were sufficient explanations for this Court to conclude that the orders were based on a procedural bar. *Burroughs v. Makowski,* 282 F.3d 410, 414 (6th Cir.), *modified on other grounds,* 35 Fed. Appx. 402 (6th Cir. 2002).

Petitioner implies that appellate counsel was "cause" for his failure to raise his claim about Virginia North in the appeal of right. Even if the Court were to assume that appellate counsel was ineffective, Petitioner was not prejudiced by the alleged constitutional error for the reasons given by the trial court:

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[7] Rule 6.508(D) was regularly followed as of 1990. *Simpson v. Jones,* 238 F.3d 399, 407 (6th Cir. 2000) (citing *Luberda v. Trippett,* 211 F.3d 1004, 1008 (6th Cir. 2000), and *Jones v. Toombs,* 125 F.3d 945, 947 (6th Cir. 1997)).

> First, . . . North's notes had already been released to [Petitioner] and . . . [the trial court] allowed defense counsel to have North confirm that she wrote them. [The trial court] also ruled that North could comment on anything already admitted into evidence. Finally, [Petitioner] was allowed to examine North extensively about scientific literature regarding children's propensity to lie, including queries about "how children can be influenced by adults," about "the cooperative conversational effect" (where children "try to give adults the answer that they think the adults want to hear"), "the confirmatory basis effect," the "repeated questioning effect in allegations of children's sexual abuse," the "labeling effect," what indicators North looks for "that would show you that a child's memory for events was incorrect," and whether North was "cognitive of the potential impact of [children's] relationships on the understanding or memories of the people involved."

People v. Kaplan, No. 92-121606-FC, *et al.*, (Oakland County Cir. Ct. Aug. 20, 1999, at 3).

Petitioner may overcome his procedurally defaulted claim, even in the absence of "cause and prejudice," upon a showing of actual innocence. *Lott v. Coyle*, 261 F.3d 594, 620 (6th Cir. 2001) (citing *Schlup*, 513 U.S. at 314-15, and

Herrerra v. Collins, 506 U.S. 390, 417 (1993)), *cert. denied,* 534 U.S. 1147 (2002). Petitioner maintains his innocence, and he has proposed an alternative hypothesis for the complainants' allegations, but he has not presented the Court with any new and reliable evidence of actual innocence. Therefore, the exception for miscarriages of justice does not apply, and the Court will not review the substantive merits of Petitioner's claim about Virginia North.

b. Jane Hanson

Petitioner alleges next that the trial court erroneously prevented him from asking Jane Hanson about a conversation that she had with Detective Jeff Brackett. Michigan Rule of Evidence 103(a)(2) requires the substance of excluded evidence to be made known to the trial court by offer of proof. Petitioner violated this procedural rule by failing to make an offer of proof.
(Tr. Sept. 17, 1993, at 12-14).

The Michigan Court of Appeals relied on Petitioner's procedural error by stating that the issue was not preserved for appellate review because Petitioner did not make an offer of proof as to the contents of Detective Brackett's statement to Jane Hanson. Rule 103 was an adequate and independent basis for the state court's ruling because the rule was firmly established long before

Petitioner's trial. *See Slayton v. Michigan Host, Inc.*, 144 Mich. App. 535, 550; 376 N.W. 2d 664, 672 (1985).

Petitioner implies that his trial attorney was "cause" for his failure to make an offer of proof. However, he has not shown prejudice from the alleged error, because Detective Brackett testified that he did not give specific information about the alleged sexual abuse to the children's parents. (Tr. Oct. 5, 1993, at 43).

The exception for miscarriages of justice does not apply, because Petitioner has not presented the Court with any new and reliable evidence of actual innocence. Therefore, Petitioner's claim about Jane Hanson is procedurally defaulted, and the Court will not review the substantive merits of the claim.

c. Admission of a Complainant's Testimony from the Preliminary Examination

Petitioner alleges that the trial court erroneously permitted the prosecution to admit the preliminary examination testimony of complainant number three to rebut the defense assertion of recent fabrication. Petitioner maintains that the complainant was subjected to improper investigative techniques before the preliminary examination and, therefore, her testimony at the preliminary examination was not made before improper motive or influence existed.

In Michigan, a party waives review of the admission of evidence that he purposely elicits or injects. *People v. King, 158* Mich. App. 672, 677; *405* N.W.2d 116, 119 *(1987).* This rule was in effect long before Petitioner's *1993* trial. Petitioner violated the procedural rule announced in *King* by attempting to use portions of the preliminary examination transcript to impeach complainant number three before the prosecutor moved to admit the entire transcript.[8] The court of appeals determined on review of Petitioner's claim that Petitioner waived review of the admission of the entire transcript because he introduced the evidence or placed the matter in issue.

The Court construes the habeas petition to allege that defense counsel was "cause" for Petitioner's procedural error. Even if defense counsel's performance amounted to ineffective assistance, Petitioner cannot show prejudice from the constitutional error, because the Michigan Court of Appeals determined that admission of the transcript was permissible under Michigan Rule of Evidence 106. The court of appeals also determined that any error in admitting the preliminary transcript was harmless, because it was cumulative of other properly admissible evidence.[9]

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[8] Defense counsel's attempt to use portions of the preliminary examination testimony prompted the prosecutor to request admission of the entire transcript. (Tr. Sept. 17, *1993*, at 12125).

The exception for miscarriages of justice does not apply, because Petitioner has not presented the Court with any new and reliable evidence of actual innocence. In sum, Petitioner's claim about admission of the preliminary examination transcript is procedurally defaulted, and he has not established "cause and prejudice" or a miscarriage of justice.

2. Claims that Have Not been Procedurally Defaulted

Two of Petitioner's evidentiary claims are exhausted and have not been procedurally defaulted. The Court will proceed to address these claims, keeping in mind that "[h]abeas review does not encompass state court rulings on the admission of evidence unless there is a constitutional violation." *Clemmons v. Sowders, 34* F.3d *352, 357* (6th Cir. 1994). Petitioner alleges that the trial court's rulings deprived him of his right to confront witnesses and to present his defense that improper questions put to the children resulted in manufactured memories of events that never occurred.

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[9] Michigan Rule of Evidence 106 states that, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

The Michigan Court of Appeals did not identify controlling Supreme Court precedent when adjudicating Petitioner's evidentiary claims. Therefore, this Court must look at the result of the state court's decision and ask whether the state court's decision was contrary to Supreme Court precedent. *Bugh v. Mitchell,* 329 F.3d 496, *507-08* (6th Cir. 2003).

The Supreme Court has said that defendants in criminal cases possess a constitutional right to present a complete defense, *California v. Trombetta*, 467 U.S. 479, 485 (1984), and a Sixth Amendment right to be confronted with the witnesses against them. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

a. Complainant's Mother

Petitioner claims that he was prevented from asking the mother of complainant number four whether her son ever told lies. The Supreme Court has stated that the Confrontation Clause does not guarantee an opportunity for cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). In this case, the minor restriction on the right to cross-examine the complainant's mother did not prevent Petitioner from presenting his defense and confronting witnesses.

Furthermore, Petitioner had no right under state law to elicit the evidence he sought. As explained by the Michigan Court of Appeals,

> [a]lthough specific instances of prior acts may, at the trial court's discretion, be inquired into on cross-examination of a witness concerning the character for truthfulness or untruthfulness of another witness, the witness subject to cross-examination must already have testified as to the character of the other witness on direct examination. [Michigan Rule of Evidence] 608(b)(2). In this case, the child's mother had not been called as a character witness and had not testified regarding her son's reputation for truthfulness. Consequently, the trial court properly precluded defense counsel from inquiring whether the boy "ever lied" on cross-examination. Moreover, such evidence does not meet the test of relevancy under [Michigan Rule of Evidence] 401 and 402.

Kaplan, Mich. Ct. App. No. 172567, at 3.

The Court concludes that the inability to ask the mother of complainant number four whether her son ever told a lie did not rise to the level of a constitutional violation, or it was harmless error due to the overwhelming evidence of guilt. Thus, the state court's denial of relief was not contrary to Supreme Court decisions on the right to confront witnesses and to present a defense.

b. Psychologist Kathleen Faller

Petitioner alleges that he was precluded from trying to show that psychologist Kathleen Faller was biased. The prosecution called Faller as a rebuttal witness to testify that children can recall sexual abuse accurately and explain what happened to them without being influenced by interviewers. Petitioner wanted to show that Faller was biased by introducing Faller's own reports from another case, as well as, evidence from other cases and a court deposition of someone who criticized Faller's manner of questioning children.

"[C]ross-examination as to bias, motive or prejudice is constitutionally protected . . . ." *Boggs v. Collins,* 226 F.3d 728, 737, 742 (6th Cir. 2000) (citations omitted). However, as the Sixth Circuit explained in *King v. Trippett,* 192 F.3d 517 (6th Cir. 1999),

> [w]hile cross-examination is the chief means by which criminal defendants may exercise their right to confront witnesses, see *Davis*

> *v. Alaska,* 415 U.S. 308, 315 (1974), 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986).

Id. at 524.

The Michigan Court of Appeals explained on review of Petitioner's claim that,

> Dr. Faller's testimony was admitted for the narrow purpose of refuting defendant's theory that children who have been treated for sexual abuse tend to fabricate allegations of sexual abuse. Dr. Faller's examination of other sexual abuse victims and her prior testimony in those cases was wholly irrelevant in this matter because Dr. Faller did not purport to testify regarding the credibility of the complainants in this case. A witness may not be impeached or contradicted regarding collateral, irrelevant, or immaterial matters. *People v. Vasher,* 449

> Mich. 494, 504; 537 NW2d 168 (1995) (citing *People v. McGillen,* 392 Mich.251; 220 NW2d 677 (1974)).

Kaplan, Mich. Ct. App. No. 172567, at 5. Furthermore, Petitioner extensively cross-examined Fuller, and he was able to elicit an admission from Fuller that, occasionally, she has been characterized as biased. (Tr. Oct. 22, 1993, at 86).

The court of appeals concluded that the trial court "properly limited cross- examination of Dr. Faller to exclude impeachment on collateral matters." Id. The state court's decision was not contrary to Supreme Court precedent, because Petitioner was not deprived of his right to present a defense and his right to confront witnesses.

D. Alleged Prosecutorial Misconduct

Petitioner's fourth claim alleges prosecutorial misconduct. Petitioner contends that the prosecutor withheld favorable evidence, vouched for the State's witnesses, and made a civic duty argument, all of which rendered the outcome of his trial unreliable.

1. *Brady* and "If the Truth Hurts"

Petitioner alleges that the prosecutor failed to disclose evidence favorable to the defense. *See Brady v. Maryland,* 373 U.S. 83 (1963). The evidence allegedly withheld consisted of (a) the complete medical record of complainant number two, (b) Petitioner's daughter's pretrial statement, which implicated Petitioner, (c) Petitioner's comment to the officers who arrested him that he had been waiting for them for three days, and (d) the investigators' handwritten notes.

Petitioner also alleges that the prosecutor vouched for the State's witnesses when she said in response to defense counsel's argument that he was attempting to impeach a witness, "[I]f the truth hurts, too bad." (Tr. Sept. 27, 1994, at 141-42). Respondent contends that Petitioner's vouching claim is unexhausted and that his *Brady* claim is procedurally defaulted.

Petitioner violated Michigan Court Rule 6.508(D)(3) by not raising his *Brady* and vouching claims on direct appeal. He apparently raised both claims for the first time in his motion for relief from judgment. The State's appellate courts denied leave to appeal the trial court's decision, because Petitioner had failed to establish entitlement to relief under Michigan Court Rule 6.508(D). The references to Rule 6.508(D) were sufficient explanations for this Court to conclude that the orders were based on a procedural bar. *Burroughs,* 282 F.3d at 414; *Simpson,* 238 F.3d at 407. Petitioner alleges that appellate counsel was cause for his failure to recognize and present his claims in the appeal of right.

The Sixth Circuit has explained that,

> In *Brady,* the Supreme Court stated that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Evidence is considered material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley,* 473 U.S. 667, 682 (1985).

Buell v. Mitchell, 274 F.3d 337, 361-62 (6th Cir. 2001).

None of the allegedly suppressed evidence would have resulted in a different result if it had been disclosed to the defense, and the comment, "If the truth hurts, too bad," was a fleeting comment in a lengthy trial where the evidence of guilt was overwhelming. Therefore, appellate counsel was not deficient in failing to raise a *Brady* claim or a claim about the prosecutor's comment.

The Court need not determine if Petitioner was prejudiced by the alleged violations of federal law, because he has not demonstrated "cause." *Smith v. Murray*, 477

U.S. 527, 533 (1986). He cannot overcome his procedurally defaulted claims through the exception for miscarriages of justice, because he has not produced new and reliable evidence of actual innocence. *Schlup*, 513 U.S. at 326-29. Therefore, the Court will not review the substantive merits of Petitioner's *Brady* claim or his claim about the prosecutor's remark, "If the truth hurts, too bad."

3. Vouching and Appealing to the Jurors' Civic Duty

Petitioner alleges that the prosecutor vouched for the State's witnesses and appealed to the jurors' civic duty in her closing argument, where she said:

> I think that the professionals that have come here and have talked to you about their investigation, about their work with these children, have been up-front, forthright and honest.
>
> We're not on an agenda here to put away an innocent person, ladies and gentlemen. That is not something that is being done.
>
> . . . .
>
> Children do have rights in this country. If we are going to say that there is liberty and justice for all, then it must include also the rights of children. It must

> include the right of children to say that they've been hurt, to say that they've been injured, to say that they've been sexually molested and to have it believed children have those rights. And, ladies and gentlemen, they've had the right to come in here and to tell what has happened. They have the right. We have to give children those rights or otherwise we're going to say that it's okay for adults to use children for their own sexual gratification and that that's okay; we're just going to live with it. And I don't think any of us want that [to] happen. None of us want that to happen.

(Tr. Oct. 25, 1993, at 122, 124-25).

The Michigan Court of Appeals intimated that Petitioner procedurally defaulted his claims about the prosecutor's closing argument by not objecting at trial. However, the record indicates that defense counsel objected to the remarks about the investigative witnesses on the ground that the prosecutor was not permitted to say what she thought. *See id.* at 122. He objected to the remarks about children's rights when the prosecutor prefaced the disputed remarks by saying: "But you know who else deserves to have rights in this case? It is the children." *Id.* at 124. Defense counsel complained that the prosecutor's remarks were part of the instruction or the law, that she was arguing facts not in evidence, and that she was making conclusions of law which did not exist.

Even if Petitioner's claim has merit, the error does not require habeas relief. Although prosecutors may not vouch for their witnesses, *United States v. Young,* 470 U.S. 1, 18 (1985), or appeal to the jurors' civic duty, *Yiereck v. United States,* 318 U.S. 236, 247 (1943), Petitioner can prevail only if he shows that prosecutorial misconduct infected the trial with such unfairness as to make the resulting conviction a denial of due process. *Byrd v. Collins,* 209 F.3d 486, 529 (6th Cir. 2000) (quoting *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). "To constitute a denial of due process, the misconduct must be `so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.* (quoting *Pritchett v. Pitcher,* 117 F.3d 959, 964 (6th Cir. 1997)). Furthermore, prosecutorial misconduct falls into the category of trial, rather than structural, errors and may be reviewed for harmless error. *Maurino,* 210 F.3d at 647.

The contested remarks in this case were a response to defense counsel's closing argument that the investigators unfairly influenced the children to believe something that did not happen and that Petitioner should be treated fairly because his life was in the jurors' hands. "The prosecutor is ordinarily entitled to wide latitude in rebuttal argument and may fairly respond to arguments made by defense counsel." *Angel v. Overberg,* 682 F.2d 605, 607-08 (6th Cir.1982) *(en banc).*

Furthermore, as the Michigan Court of Appeals explained, the prosecutor was permitted to address Petitioner's theory of the case and to argue that a witness should be believed. Most importantly, there was overwhelming evidence of Petitioner's guilt, and the trial judge instructed the jury that the attorneys' arguments were not evidence and should not be considered in reaching a verdict.

This Court concludes that the state court's decision was a reasonable application of federal law, as determined by the Supreme Court. Alternatively, the alleged prosecutorial misconduct was harmless, because it could not have had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)).

E. Alleged Ineffective Assistance of Counsel

Petitioner's fifth claim alleges ineffective assistance of trial and appellate counsel. Petitioner contends that the prosecution's intentional withholding of material evidence and the trial court's evidentiary rulings rendered his trial attorney ineffective. Petitioner concludes that prejudice must be presumed, because, in his opinion, the state interfered with defense counsel's assistance.

As previously explained,

> To show a violation of the Sixth Amendment right to counsel, clearly established Supreme Court precedent requires a defendant to demonstrate (1) that his or her attorney "made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that the attorney's deficient performance was so prejudicial that it deprive[d] the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

Roberts v. Carter, 2003 WL 21699471, at *3.

The record indicates that Petitioner's trial attorneys were tireless advocates for Petitioner, and Petitioner's underlying claims have no merit. Petitioner has failed to show that his trial attorney's performance was both deficient and prejudicial.

Petitioner alleges that his appellate attorney failed to raise significant and obvious issues in the appeal of right. However, indigent appellants have no constitutional right to compel their appointed attorneys to make every nonfrivolous argument on appeal. *Evitts v. Lucey,* 469 U.S.

387, 394 (1985). None of the claims omitted on appeal was a "dead-bang winner" that is, "an issue which was obvious from the trial record *and* one which would have resulted in a reversal on appeal." *United States v. Cook*, 45 F.3d 388, 395 (10th Cir. 1995) (citation omitted) (emphasis in original).

Petitioner has failed to show that his attorneys' representation fell below an objective standard of reasonableness and that the result of the proceeding would have been different but for his attorneys' allegedly unprofessional errors.

F. Cumulative Effect of Errors

Petitioner's sixth and final claim alleges that the cumulative effect of the constitutional errors presented in the habeas petition deprived Petitioner of a fair trial. This claim lacks merit because "[t]he Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief." *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir.), *opinion corrected on denial of reh'g*, 307 F.3d 459 (2002), *cert. denied*, ____ U.S. ____, 123 S. Ct. 1621 (2003). Therefore, the state courts' denial of relief was not contrary to any Supreme Court decision so as to warrant habeas relief. *Id.*

IV. Conclusion

For the all the reasons given above, the Court concludes that Petitioner is not entitled to habeas relief. Accordingly, Petitioner's application for the writ of habeas corpus is DENIED.

/s/ Arthur J. Tarnow
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

Dated: July 1, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
July 31, 2003
Eastern District
of Michigan

HOWARD JAY KAPLAN,
Petitioner,

v. **CASE NO. 02-CV-72662-DT**

MARY BERGHUIS,
Respondent.
_____________________/

JUDGMENT

This matter having come before the Court on a Petition for the Writ of Habeas Corpus, United States District Judge **ARTHUR J. TARNOW** presiding, and in accordance with the Opinion and Order entered on Jul 31 2003.

IT IS ORDERED that the Petition for a Writ of habeas Corpus is **DENIED.**

Dated at Detroit, Michigan on July 31, 2003.

DAVID J. WEAVER
CLERK O FTHE COURT

BY: /s/ Theresa E. Taylor
DEPUTY CLERK

APPROVED:

/s/ Arthur J. Tarnow
ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

Order

Michigan Supreme Court
Lansing, Michigan

Entered: May 29, 1998

Conrad L. Mallett, Jr.
Chief Justice

FILED
June 1, 1998
State of Michigan,
Supreme Court

109812

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

HOWARD KAPLAN,

Defendant-Appellant.

SC: 109812
COA: 172567
LC: 92-121934-FC
92-121935-FC
92-121936-FC
92-121937-FC
92-121938-FC
92-121941-FC
92-121606-FC
92-121607-FC
92-121608-FC

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be viewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a complete copy of the order entered at the direction of the Court.

May 29 , 19 98 /s/ Corbin R. Davis

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD KAPLAN,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 172567
Oakland County
LC Nos.
92-121934-FC,
92-121935-FC
92-121936-FC
92-121937-FC
92-121938-FC
92-121941-FC
92-121606-FC
92-121607-FC
92-121608-FC

FILED
Dec. 30, 1996

State of Michigan,
Court of Appeals

Before: Young, P.J., and O'Connell and W.J. Nykamp, [*]JJ.

PER CURIAM.

Defendant appeals as of right his convictions of sixteen counts of first-degree criminal sexual conduct [CSC

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[*] Circuit judge, sitting on the Court of Appeals by assignment.

IJ, MCL 750.520b(1)(a); MSA 28.788(2)(1)(x), eighteen counts of second-degree criminal sexual conduct [CSC II], MCL 750.520c(1)(a); MSA 28.788(3)(1)(x), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. We affirm.

Defendant was charged with molesting his eight-year-old daughter and three of her friends during sleepovers on nine separate occasions between September 11, 1992 and November 6, 1992. Following a seventeen-day trial, a jury convicted defendant of all thirty-four counts of CSC with which he was charged. A separate jury then convicted defendant as an habitual offender. Defendant received twenty-two life terms and twelve thirty-five to eighty-five year sentences.

Defendant first contends that the trial court abused its discretion and violated defendant's due process rights in finding the children competent to testify when investigators did not videotape or audiotape their interviews with the children. Defendant claims that the recordings were necessary-to support his defense that the investigators improperly-influenced the children's testimony. Whether the children were improperly influenced impacts on their credibility rather than their competence to testify. MCL 600.2163; MSA 27A-2163; MRE 601; *People v. Coddington,* 188 Mich App 584, 597; 470 NW2d 478 (1991). Therefore, the trial court did not abuse its discretion in permitting the children to testify after determining that they were capable of distinguishing the truth from falsity and that they were aware of their obligation to testify truthfully.

Defendant cites no Michigan authority requiring that interviews with sexual abuse victims be videotaped or audiotaped. Nor did the absence of videotapes or audiotapes of the interviews prejudice defendant in the presentation of his defense because the trial court permitted the introduction of the testimony of two experts regarding the dangers of interviewer bias and children's susceptibility to suggestive or leading questioning. The jury apparently found the testimony of the prosecution's witnesses to be more credible than that proffered by defendant. Defendant "is not entitled to retry his case on appeal." *People v. Lee,* 391 Mich 618, 643; 218 NW2d 655 (1974). Therefore, reversal is not required on the basis of this issue.

Defendant next claims that the trial court abused its discretion by admitting into evidence the preliminary examination testimony of one of the victims. When defense counsel attempted to use portions of the child's testimony at the preliminary examination to impeach her testimony at trial, the prosecutor asked to have the entire transcript admitted so that the jury could read her answers in context. A party waives review of the admission of evidence that he introduced or that was made relevant by his own placement of a matter in issue. *People v. King,* 158 Mich App 672, 677; 405 NW2d 116 (1987). Moreover, even if the admission of the child's preliminary examination testimony was error, Michigan courts have repeatedly .held that "improperly admitted hearsay evidence constitutes harmless error when it is merely cumulative of other properly admitted evidence." Solomon v. *Shuell,* 435 Mich 104, 146; 457 NW2d 669 (1990); *People v. Van Tassel (On Remand),* 197 Mich App 653, 655-656; 496 NW2d 388 (1992); *People v. Hunt,* 170 Mich App 1, 13; 427 NW2d 907 (1988). Finally, introduction of the remainder of this testimony was permissible under MRE 106, which permits admission of remaining portions of a written or recorded statement that in fairness should be considered contemporaneously with portions already introduced into evidence.

Defendant also contends that his due process rights were violated when the trial court sua sponte remarked that the similarity in two investigative reports might reflect their truth. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. *City of Lansing v.* Hartsuff, 213 Mich App 338, 349-350; 539 NW2d 781 (1995).

When reviewed in context, it is apparent that the court's comment related to the relevance of the line of questioning and the court's observance that the similarity of the reports could be equally probative of either their truth or their falsity. Consequently, the comment cannot be characterized as an expression of the court's opinion regarding the credibility of the testimony that unduly influenced the jury. *People v. Paquette,* 214 Mich App 336, 340-341; 543 NW2d 342 (1995). Moreover, any prejudice to defendant was overcome by the trial court's instructions to the jury directing it to disregard any of the court's comments or rulings. Therefore, we do not find that this issue provides grounds for reversal.

Defendant also argues that the trial court violated his due process rights by refusing to allow defense counsel to ask the mother of one of the children whether her son ever told lies. We disagree. Although specific instances of prior acts may, at the trial court's discretion, be inquired into on cross-examination of a witness concerning the character for truthfulness or untruthfulness of another witness, the witness subject to cross-examination must already have testified as to the character of the other witness on direct examination. MRE 608(b)(2). In this case, the child's mother had not been called as a character witness and had not testified regarding her son's reputation for truthfulness. Consequently, the trial court properly precluded defense counsel from inquiring whether the boy "ever lied" on cross-examination. Moreover, such evidence does not meet the test of relevancy under MRE 401 and 402.

Defendant argues next that the trial court abused its discretion when it refused to allow defense counsel to question one of the victims' mothers about what a detective said to her. Defense counsel claimed that the statement was not hearsay because it was being offered to show its effect on the listener and establish bias in the speaker. Although defense counsel argued that the statement was admissible, he failed to make an offer of proof as to the contents of the statement. Thus, this issue is not preserved for appellate review. MRE 103; Slayton v. *Michigan* Host, Inc, 1441Vfich App 535, 550; 376 NW2d 664 (1985). Even if exclusior of the question was error, it was harmless in light of the fact that the detective later testified regarding what he told the parents of the children. *People v. Minor,* 213 Mich App 682, 688; 541 NW2d 576 (1995). Therefore, reversal is not required on the basis of this issue.

Defendant also claims that the trial court abused its discretion by allowing the late endorsement of two witnesses: defendant's former girlfriend and another child that defendant allegedly molested two or three years earlier. We disagree. MCL 767.40x(4); MSA 28.980(1)(4) [§ 40x] "contemplates that the prosecutor will give advance notice of all known res gestae witnesses and specify before trial which known witnesses it intends to call." *People v. Burwick*, 450 Mich 281, 290; 537 NW2d 813 (1995). A violation of § 40a does not require automatic dismissal. Rather, the trial court must exercise its discretion in fashioning a remedy for noncompliance with a discovery statute, rule, order or agreement. *People v.* Williams, 188 Mich App 54, 58-59; 469 NW2d 4 (1991).

In the instant case, there was no violation of § 40a because neither the former girlfriend nor the child were res gestae witnesses and the prosecutor did not intend to call either of them before trial. The prosecution became aware of defendant's former girlfriend's knowledge relating to the case only a few days before her testimony. Defense counsel was permitted to interview defendant's former girlfriend prior to her testimony, did not request a continuance and had sufficient notice that he was able to present testimony challenging her credibility. It was established at trial that the decision to bring the child witness, who lived in another state, to Michigan to testify was made only one week prior to her testimony and that the prosecutor was informed of her potential testimony only the day before. Defendant did not object to the admission of the child's testimony, did not ask to interview her prior to her testimony and did not request a continuance. Instead, defense counsel waited until after her testimony to move for a mistrial on that basis. It is well established in Michigan that "error requiring reversal must be that of the trial court and not that to which the appellant contributed by plan or negligence." *Fellows v. Superior Products Co,* 201 Mich App 155, 165; 506 NW2d 534 (1993). Furthermore, defendant's contention that the court's late admission of these witnesses prejudiced him in the choice of a defense theory is without merit. Defendant's failure to identify any alternative defense theory precludes a finding of prejudice. *Burwick, supra* at 295 n 18.

Next, defendant claims that the trial court abused its discretion and violated his due process rights by admitting the testimony of the late endorsed witnesses. Defendant argues that the testimony regarding other acts was inadmissible under HIRE 404(b) because it was offered solely to show that defendant had a propensity to commit such acts. "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v. VanderMet,* 444 Mich 52, 65; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). Thus, if there is some other ground under MRE 404(B) for admission of the testimony regarding defendant's other acts, the testimony is admissible. *Id.*, at 83-84.

In this case, the prosecutor stated that she was offering the child's testimony with regard to defendant's conduct occurring approximately two years earlier to rebut defendant's claim that the children in the instant case had been coached and that he was a victim of a conspiracy on the part of the adults involved. In *People v. Lee,* 212 Mich App 228, 245-246; 537 NW2d 233 (1995), this Court held that the testimony of another victim of the defendant was admissible "for the limited purpose of showing that defendant committed the crime at issue" when the testimony was admitted to show the defendant's plan or pattern of attracting victims and was accompanied by a limiting instruction. See also *People v. Miller (On Remand),* 186 Mich App 660, 664; 465 NW2d 47 (1991). In the instant case, the witness was the same age as the victims when the alleged molestation occurred, was a friend of defendant's daughter and was molested in the same manner and under the same circumstances, a sleepover visit. Consequently, her testimony was admissible under MRE 404(b) to show defendant's common plan, scheme or system of sexually abusing his daughter and her friends during sleepovers. The trial court gave the jury a limiting instruction. Therefore, reversal is not required on the basis of this issue.

In addition to corroborating other specific aspects of the victims' testimony, defendant's former girlfriend testified that he had asked her at one point to shave her pubic hair. Although testimony regarding defendant's sexual practices with another consenting adult is not probative of whether defendant transferred those practices to children, his admitted preference for the appearance of prepubescent girls is arguably probative of his motivation in committing the charged offenses. MRE 404(b). Ordinarily, a trial court's decision on a close evidentiary issue cannot be an abuse of discretion. *People v. Bahoda,* 448 Mich 261, 289; 531 NW2d 659 (1995). However, even if admission of the testimony was error, reversal is not required in view of the overwhelming evidence of defendant's guilt. MCL 769.26; MSA 28.1096. Although the victims had little or no contact with each other, they each gave the same graphic and detailed account from the outset and their version of what happened was supported by the other evidence at trial. Therefore, we find no error rising to the level of that requiring reversal.

Finally, defendant contends that he was denied his right to a fair trial by the prosecutor's remarks in closing argument in which defendant claims the prosecutor vouched for the credibility of the witnesses and appealed to the jurors' civic duty. In the absence of an objection on these grounds, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v. Whitfield,* 214 Mich App 348, 352; 543 NW2d 347 (1995). A prosecutor may argue, as the prosecutor did in this case, that a witness should be believed. *People v.* Swartz, 171 Mich App 364, 371; 429 NW2d 905 (1988). In addition, reversal is not required because the prosecutor's remarks addressed defendant's theory of the case and were based on the expert testimony introduced at trial. *People v. Duncan,* 402 Mich 1, 16; 260 NW2d 58 (1977); *People v. Guenther,* 188 Mich App 174, 181-182; 469 NW2d 59 (1991). Even if the remarks were improper, however, we find no miscarriage of justice occurred in light of the overwhelming evidence of defendant's guilt and the fact that the trial judge instructed the jury that the attorneys' arguments were not evidence and were not to be considered in reaching a verdict. Consequently, defendant's claim of error is without merit.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Peter D. O'Connell
/s/ Wesley J. Nykamp

STATE OF MICHIGAN
COURT OF APPEALS

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(AMENDED)

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FILED
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In the instant case, there was no violation of § 40a because neither the former girlfriend nor the child were res gestae witnesses and the prosecutor did not intend to call either of them before trial. The prosecution became aware of defendant's former girlfriend's knowledge relating to the case only a few days before her testimony. Defense counsel was permitted to interview defendant's former girlfriend prior to her testimony and was able to present a witness to challenge her credibility. Hence, the court's denial of defendant's request for a continuance did not prejudice defendant and was not in error.[1] *People v. Lawton,* 196 Mich App 341, 348; 492 NW2d 810 (1992).

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[1] In our previous opinion, we stated, in error, that defendant had not requested a continuance with respect to the late endorsement of defendant's former girlfriend as a witness. The fact that defendant had requested a continuance,

It was established at trial that the decision to bring the child witness, who lived in another state, to Michigan to testify was made only one week prior to her testimony and that the prosecutor was informed of her potential testimony only the day before. Defendant did not object to the admission of the child's testimony, did not ask to interview her prior to her testimony and did not request a continuance. Instead, defense counsel waited until after her testimony to move for a mistrial on that basis. It is well established in Michigan that "error requiring reversal must be that of the trial court and not that to which the appellant contributed by plan or negligence." *Fellows v. Superior Products Co,* 201 Mich App 155, 165; 506 NW2d 534 (1993). Furthermore, defendant's contention that the court's late admission of these witnesses prejudiced him in the choice of a defense theory is without merit. Defendant's failure to identify any alternative defense theory precludes a finding of prejudice. *Burwick, supra* at 295 n 18.

Next, defendant claims that the trial court abused its discretion and violated his due process rights by admitting the testimony of the late endorsed witnesses. Defendant argues that the testimony regarding other acts was inadmissible under HIRE 404(b) because it was offered

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however, does not alter our conclusion that no error occurred for the reasons stated in the text.

solely to show that defendant had a propensity to commit such acts. "Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v. VanderMet,* 444 Mich 52, 65; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). Thus, if there is some other ground under MRE 404(B) for admission of the testimony regarding defendant's other acts, the testimony is admissible. *Id.*, at 83-84.

In this case, the prosecutor stated that she was offering the child's testimony with regard to defendant's conduct occurring approximately two years earlier to rebut defendant's claim that the children in the instant case had been coached and that he was a victim of a conspiracy on the part of the adults involved. In *People v. Lee,* 212 Mich App 228, 245-246; 537 NW2d 233 (1995), this Court held that the testimony of another victim of the defendant was admissible "for the limited purpose of showing that defendant committed the crime at issue" when the testimony was admitted to show the defendant's plan or pattern of attracting victims and was accompanied by a limiting instruction. See also *People v. Miller (On Remand),* 186 Mich App 660, 664; 465 NW2d 47 (1991). In the instant case, the witness was the same age as the victims when the alleged molestation occurred, was a friend of defendant's daughter and was molested in the same manner and under the same circumstances, a sleepover visit. Consequently, her testimony was admissible under MRE 404(b) to show defendant's common plan, scheme or system of sexually abusing his daughter and her friends during sleepovers. The trial court gave the jury a limiting instruction. Therefore, reversal is not required on the basis of this issue.

In addition to corroborating other specific aspects of the victims' testimony, defendant's former girlfriend testified that he had asked her at one point to shave her pubic hair. Although testimony regarding defendant's sexual practices with another consenting adult is not probative of whether defendant transferred those practices to children, his admitted preference for the appearance of prepubescent girls is arguably probative of his motivation in committing the charged offenses. MRE 404(b). Ordinarily, a trial court's decision on a close evidentiary issue cannot be an abuse of discretion. *People v. Bahoda,* 448 Mich 261, 289; 531 NW2d 659 (1995). However, even if admission of the testimony was error, reversal is not required in view of the overwhelming evidence of defendant's guilt. MCL 769.26; MSA 28.1096. Although the victims had little or no contact with each other, they each gave the same graphic and detailed account from the outset and their version of what happened was supported by the other evidence at trial. Therefore, we find no error rising to the level of that requiring reversal.

Finally, defendant contends that he was denied his right to a fair trial by the prosecutor's remarks in closing argument in which defendant claims the prosecutor vouched for the credibility of the witnesses and appealed to the jurors' civic duty. In the absence of an objection on these grounds, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v. Whitfield,* 214 Mich App 348, 352; 543 NW2d 347 (1995). A prosecutor may argue, as the prosecutor did in this case, that a witness should be believed. *People v.* Swartz, 171 Mich App 364, 371; 429 NW2d 905 (1988). In addition, reversal is not required because the prosecutor's remarks addressed defendant's theory of the case and were based on the expert testimony introduced at trial. *People v. Duncan,* 402 Mich 1, 16; 260 NW2d 58 (1977); *People v. Guenther,* 188 Mich App 174, 181-182; 469 NW2d 59 (1991). Even if the remarks were improper, however, we find no miscarriage of justice occurred in light of the overwhelming evidence of defendant's guilt and the fact that the trial judge instructed the jury that the attorneys' arguments were not evidence and were not to be considered in reaching a verdict. Consequently, defendant's claim of error is without merit.

Next we address the issues raised in defendant's supplemental pro per brief. In his first pro per issue, defendant argues that the trial court improperly limited defense counsel's impeachment of Dr. Kathleen Faller, an expert proffered by the prosecution in rebuttal to defendant's expert, Dr. Ralph Underwager.[2] Defendant contends that he was not allowed to impeach Dr. Faller during voir dire or during cross-examination to show that her conduct in past cases reflected her bias as a validator of false allegations of sexual abuse. Defendant concludes that the court's action prevented him from asserting his theory that the complainants in this matter had falsified their allegations after being coached by professionals. Defendant's argument is without merit.

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[2] Faller was introduced as a rebuttal witness for the narrow purpose of responding to Dr. Underwager's testimony. Dr. Underwager testified in essence that children, who receive traditional psychological treatment for alleged sexual abuse, lose memories of actual events and fabricate allegations of sexual abuse. Dr. Faller testified that her research indicated that an eight year-old child's memory was equivalent to an adult's memory and that at this age, children were no more subject to psychological suggestion than an adult was. She also testified that children were generally reluctant to divulge that they have been sexually abused.

A trial court's decision to limit cross-examination is reviewed for an abuse of discretion. *Minor, supra,* 213 Mich App at 684. Dr. Faller's testimony was admitted for the narrow purpose of refuting defendant's theory that children who have been treated for sexual abuse tend to fabricate allegations of sexual abuse. Dr. Faller's examination of other sexual abuse victims and her prior testimony in those cases was wholly irrelevant in this matter because Dr. Faller did not purport to testify regarding the credibility of the complainants in this case. A witness may not be impeached or contradicted regarding collateral, irrelevant, or immaterial matters. *People v.* Masher, 449 Mich 494, 504; 537 NW2d 168 (1995)(citing *People v. McGillen No 1*, 392 Mich 251; 220 NW2d 677 (1974)). Thus, the court properly limited cross-examination of Dr. Faller to exclude impeachment on collateral matters.

In his second pro per issue, defendant reiterates his claim that the court abused its discretion regarding his limitation of Dr. Faller's cross-examination, and further contends that the court was biased against him in making his rulings on this and other matters. Defendant contends that it was unfair to allow the prosecution to show evidence regarding his expert's bias while denying the same opportunity to defendant with Dr. Faller, the prosecution's expert. We disagree. First, defense counsel argued that he sought to challenge Dr. Faller's truthfulness, not bias. To preserve an evidentiary issue for appellate review, a party must object timely at trial and specify the same ground for objection as is asserted on appeal. *People v. Considine,* 196 Mich App 160; 162; 492 NW2d 465 (1992). Second, because we hold that the court properly exercised his discretion in limiting cross-examination and impeachment of Dr. Faller and given the overwhelming evidence against defendant, any prejudice that occurred from this alleged inequity was harmless. *People v. Mateo,* 453 Mich 203; 551 NW2d 891 (1996).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Peter D. O'Connell
/s/ Wesley J. Nykamp

CONSTITUTION OF THE UNITED STATES

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONSTITUTION OF THE UNITED STATES

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,*(See Note 15)* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Nonparametric Statistics
FOR THE BEHAVIORAL SCIENCES

SIDNEY SIEGEL

Research Professor Psychology
The Pennsylvania State University

McGRAW-HILL BOOK COMPANY, INC.

New York Tornoto London

1956

J-1

Power

With Tocher's modification, the Fisher Test is the most powerful of one-tailed tests (in the sense of Newman and Pearson) for data of the kind for which the test is appropriate (Cochran, 1952).

References

Other discussions of the Fisher Test may be found in Barnard (1947), Cochran (1952), Finney (1948), Fisher (1934, sec. 2.02), McNemar (1955, pp. 240-242), and Tocher (1950).

THE χ^2 TEST FOR TWO INDEPENDENT SAMPLES

Function

When the data of research consists of frequencies in discrete categories the χ^2 test may be used to determine the significance of differences between two independent groups. The measurement involved may be as weak as nominal scaling.

The hypothesis under test is usually that the two groups differ with respect to some characteristic and therefore with respect to the relative frequency with which group members fall in several categories. To test this hypothesis, we count the number of cases from each group which fall in the various categories, and compare the proportion of cases from one group in the various categories with the proportion of cases from the other group. For example, we might test whether two political groups differ in their agreement or disagreement with some opinion, or we might test whether the sexes differ in the frequency with which they choose certain leisure time activities, etc.

Method

The null hypothesis may be tested by

$$x^2 = \sum_{i=1}^{r} \sum_{j=1}^{k} \frac{(O_{ij} - E_{ij})^2}{E_{ij}} \qquad (6.3)$$

where O_{ij} = observed number of cases categorized in *i*th row of *j*th column

E_{ij} = number of cases expected under H_o to be categorized in *i*th row of *j*th column

$\sum_{i=1}^{r} \sum_{j=1}^{k}$ direct one to sum over all *(r)* rows and all *(k)* columns, i.e., to sum over all cells

The values of χ^2 yielded by formula (6.3) are distributed approximately as chi square with $df = (r - 1)(k - 1)$, where r = the number of rows and k = the number of columns in the contingency table.

To find the expected frequency for each cell (E_{ij}), multiply the two marginal totals common to a particular cell, and then divide this product by the total number of cases, N.

We may illustrate the method of finding expected values by a simple example, using artificial data. Suppose we wished to test whether tall and short persons differ with respect to leadership qualitites. Table 6.7 shows the frequencies with which 43 short people and 52 tall people are categorized as "leaders," and "followers," and as "unclassifiable." Now the null hypothesis would be that

TABLE 6.7. HEIGHT AND LEADERSHIP
(Artificial data)

	Short	Tall	Total
Leader	12	32	44
Follower	22	14	36
Unclassifiable	9	6	15
Total	43	52	95

height is independent of leader-follower position, i.e., that the proportion of tall people who are leaders is the same as the proportion of short people who are leaders, that the proportion of tall people who are followers is the same as the proportion of short people who are followers, etc. With such hypothesis, we may determine the expected frequency for each cell by the method indicated.

Table 6.8. Height and Leadership: Observed and Expected Frequencies
(Artificial data)

	Short	Tall	Total
Leader	*19.9* 12	*24.1* 32	44
Follower	*16.3* 22	*19.7* 14	36
Unclassifiable	*6.8* 9	*8.2* 6	15
Total	43	52	95

In each case we multiply the two marginal totals common to a particular cell, and then divide this product by *N* to obtain the expected frequency. Thus, for example, the expected frequence for the lower right-hand cell in Table 6.7 is E_{32} =

$\frac{(52)(15)}{95} = 8.2$. Table 6.8 shows the expected frequencies for each of the six cells for the data shown in Table 6.7. In each case the expected frequencies are show in italics in Table 6.8, which also shows the various observed frequencies.

Now if the observed frequencies are in close agreement with the expected frequencies, the differences (O_{ij} - E_{ij}) will of course be small, and consequently the value of χ^2 will be small. With a small value of χ^2 we may not reject the null hypothesis that the two sets of characteristics are independent of each other. However, if some or many of the differences are large, then the value of χ^2 will also be large. The large is χ^2, the more likely it is that the two groups differ with respect to the classifications.

The sampling distribution of χ^2 as defined by formula (6.3) can be shown to be approximated by a chi-square[1] distribution with

$$df = (r - 1)(k - 1)$$

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[1] To avoid confusion, the symbol χ^1 is used for the quantity in formula (6.3) which is computed from the observed data when a χ^1 test is performed. The words "chi-square"refer to a random variable which follows the chi-square distribution, tabled in Table C.

The probabilities associated with various values of chi square are given in Table C of the Appendix. If an observed value of χ^2 is equal to or greater than the value give in Table C for a particular level of significance, at a particular *df*, then H_0 may be rejected at that level of significance.

Notice that there is a difference sampling distribution for every value of *df*. That is, the significance of any particular value of χ^2 depends on the number of degrees of freedom in the data from which it was computed. The size of *df* reflects the number of observations that are free to vary after certain restrictions have been placed on the data. (Degrees of freedom are discussed in Chap. 4)

The degrees of freedom from an r x k contingency table may be found by

$$df = (r - 1)(k - 1)$$

where r = number of classifications (rows)

k = number of groups (columns)

For the data in Table 6.8, $r = 3$ and $k = 2$, for we have 3 classifications (leader, follower, and unclassifiable) and 2 groups (tall and short). This the $df = (3 - 1)(2 - 1) = 2$.

The computation of χ^2 for the data in Table 6.8 is straightforward:

$$\chi^2 = \sum_{i=1}^{r} \sum_{j=1}^{k} \frac{(O_{ij} - E_{ij})^2}{E_{ij}} \tag{6.3}$$

$$= \frac{(12 - 19.9)^2}{19.9} + \frac{(32 - 24.1)^2}{24.1} + \frac{(22 - 16.3)^2}{16.3} + \frac{(14 - 19.7)^2}{19.7} + \frac{(9 - 6.8)^2}{6.8} + \frac{(6 - 8.2)^2}{8.2}$$

$$= 3.14 + 2.59 + 1.99 + 1.65 + .71 + .59$$

$$= 10.67$$

To determine the significance of $\chi^2 = 10.67$ when $df = 2$, we turn to Table C. The table show that this value of χ^2 is significant beyond the .01 level. Therefore we could reject the null hypothesis of no differences at $\alpha = .01$.

2 x 2 contingency tables. Perhaps the most common of all uses of the χ^2 test is the test of whether an observed breakdown of frequencies in a 2 x 2 contingency table cound have occurred under H_o. We are familiar with the form of such a table; an example is Table 6.1. When applying the χ^2 test to data where both *r* and *k* equal 2, formula (6.4) should be used:

$$\chi^2 = \frac{N\left(|AD - BC| - \frac{N}{2}\right)^2}{(A + B)(C + D)(A + C)(B + D)} \qquad df = 1 \qquad (6.4)$$

This formula is somewhat easier to apply then formula (6.3), inasmuch as only one division is necessary in the computation. It has the additional advantage of incorporating a correction for continuity which markedly improves the approximation of the distribution of the computer χ^2 by the chi-square distribution.

Example

> Adams studied the relation of vocational interests and curriculum choice to rate of withdrawal from college by bright students.[2] Her subjects were students who scored at or above 90th percentile in college entrance tests of intelligence, and who changed their majors following matriculation. She compared those bright

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[2] Adams, Lois. 1955. A study of intellectually gifted students who withdrew from the Pennsylvania State University. Unpublished master's thesis, Pennsylvania State University.

students whose curriculum choice was in the direction indicated as desirable by their scores on the Strong Vocational Interest Test (such a change was called "positive") with those bright students whose curriculum change was in a direction contrary to that suggested by their tested interests. Her hypothesis was that those who made positive curriculum changes would more frequently remain in school.

i. *Null Hypothesis*. H_0: there is no difference between the two groups (positive curriculum changers and negative curriculum changers) in the proportion of members who remain in college. H_1: a greater proportion of students who make positive curriculum changes remain in college than is the case with those who make negative curriculum changes.

ii. *Statistical Test*. The χ^2 test for two independent samples is chosen because the two groups (positive and negative curriculum changes) are independent, and because the "scores" under study are frequencies in discrete categories (withdrew and remained).

iii. *Significance Level.* Let $\alpha = .05$. N = the number of students in the sample = 80.

iv. *Sampling Distribution.* χ^2 as computed from formula (6.4) has a sampling distribution which is approximated by the chi-square distribution with *df* = 1. Critical values of chi square are given in Table C.

v. *Rejection Region.* The region of rejection consists of all values of χ^2 which are so large that the probability associated with their occurrence is equal to or less than $\alpha = .05$. Since H_1 predicts the direction of the between the two groups, the region of rejection is one-tailed. Table C shows that for a one-tailed test, when *df* = 1, a χ^2 of 2.71 or larger has probability of occurrence under H_0 of $p = ½\ (.10) = .05$. Therefore the region of rejection consists of all $\chi^2 \geq 2.71$ if the direction of the results is that predicted by H_1.

vi. Decision. Adams' findings are presented in Table 6.9. This table shows that of the 56 bright students who made positive curriculum changes, 10 withdrew and 46 remained in college. Of

TABLE 6.9. CURRICULUM CHANGE AND WITHDRAWAL FROM COLLEGE AMONG BRIGHT STUDENTS

	Direction of Curriculum change		
	Positive	Negative	Total
Withdrew	10	11	21
Remained	46	13	59
Total	56	24	80

the 24 who made negative changes, 11 withdrew from college and 13 remained.

The value of χ^2 for these data is

$$\chi^2 = \frac{N\left(|AD - BC| - \frac{N}{2}\right)^2}{(A + B)(C + D)(A + C)(B + D)} \qquad (6.4)$$

$$= \frac{80(|(10)(13) - (11)(46)| - \frac{80}{2})^2}{(21)(59)(56)(24)}$$

$$= \frac{80(336)^2}{1,665,216}$$

$$= 5.42$$

The probability of occurrence under H_0 for $\chi^2 \geq 5.42$ with $df = 1$ is $p < \frac{1}{2}(.02) = p < .01$. Inasmuch as this p is less than $\alpha = 0.5$, the decision is the reject H_0 in favor of H_1. We conclude that bright students who make "positive" curriculum changes remain in college more frequently than do bright students who make "negative" curriculum changes.

Small expected frequencies. The χ^2 test is applicable to data in a contingency table only if the expected frequencies are sufficiently large. The size requirements for expected frequencies are discussed below. When the observed expected frequencies do not meet these requirements, one may increase their values by combining cells, i.e., by combining adjacent classifications and thereby reducing the number of cells. This may be properly done only if such combining does not rob the data of their meaning . IN our fictitious "study" of height and leadership, of course, any combining of categories would have rendered the data useless for testing our hypothesis. The researcher my usually avoid this problem by planning in advance to collect a fairly large number of cases relative to the number of classification he wishes to use in his analysis.

Summary of procedure. These are the steps in the use of the χ^2 test for two independent samples:

1. Casts the observed frequencies in a *k* x *r* contingency table, using the *k* columns for the groups and the *r* rows for the conditions. Thus for this test $k = 2$.

2. Determine the expected frequency for each cell by finding the product of the marginal totals common to it and dividing this by *N*. (*N* is the sum of each group of marginal totals. It represents the total number of *independent* observations. Inflated *N*'s invalidate the test.) Step 2 is unnecessary if the data are in a 2 x 2 table and thus formula (6.4) is to be used.

3. For a 2 x 2 table, compute χ^2 by formula (6.4). When r is larger than 2, compute χ^2 by formula (6.3).

4. Determine the significance of the observed χ^2 by reference to Table C. For a one-tailed test, halve the significance level shown. If the probability given by Table C is equal to or smaller than α, reject H_0 in favor of H_1.

When to Use the χ^2 Test

As we have already noted, the χ^2 test requires that the expected frequencies (E_{ij}) in each cell should not be too small. When they are smaller than minimal, the test may not be properly or meaningfully used. Cochran (1954) makes these recommendations:

The 2 x 2 case. If the frequencies are in a 2 x 2 contingency table, the decision concerning the use of χ^2 should be guided by these considerations:

1. When $N > 40$, use χ^2 corrected for continuity, i.e., use formula (6.4).

2. When N is between 20 and 40, the χ^2 test [formula (6.4)] may be used *if* all expected frequencies are 5 or more. If the smallest expected frequency is less than 5, use the Fisher test (pages 94 to 104).

3. When $N < 20$, use the Fisher test in all cases.

Contingency tables with *df* larger than 1. When k is larger then 2 (and thus $df > 1$), the χ^2 test may be used if fewer than 20 percent of the cells have an expected frequency of less than 5 and if no cell has an expected frequency of less than 1. If these requirement are not met by the data in the form in which they were originally collected, the researcher must combine adjacent categories in order to increase the expected frequencies in the various cells. Only after he has combined categories to meet the above requirements may he meaningfully apply the χ^2 test.

When df > 1, χ^2 test are insensitive to the effects of order, and this when a hypothesis takes order into account, χ^2 may not be the best test. The reader may consult Cochran (1954) for methods that strengthen the common χ^2 tests when H_0 is tested against specific alternatives.

Power

When the χ^2 test is used there is usually no clear alternative and this the exact power of the test is difficult to compute. However, Cochran (1952) has shown that the limiting power distribution of χ^2 tends to 1 as N becomes large.

References

For other discussions of the χ^2 test, the reader may refer to Cochran (1952; 1954), Dixon and Massey (1951, chap. 13), Edwards (1954

APPENDIX

TABLE C. TABLE OF CRITICAL VALUES OF CHI SQUARE[*]

df	Probability under H_0 that $\chi^2 \geq$ chi square						
	.99	.98	.95	.90	.80	.70	.50
1	.00016	.00063	.0039	.016	.064	.15	.46
2	.02	.04	.10	.21	.45	.71	1.39
3	.12	.18	.35	.58	1.00	1.42	2.37
4	.30	.43	.71	1.06	1.65	2.20	3.36
5	.55	.75	1.14	1.61	2.34	3.00	4.35
6	.87	1.13	1.64	2.20	3.07	3.83	5.35
7	1.24	1.56	2.17	2.83	3.82	4.67	6.35
8	1.65	2.03	2.73	3.49	4.59	5.53	7.34
9	2.09	2.53	3.32	4.17	5.38	6.39	8.34
10	2.56	3.06	3.94	4.86	6.18	7.27	9.34
11	3.05	3.61	4.58	5.58	6.99	8.15	10.34
12	3.57	4.18	5.23	6.30	7.81	9.03	11.34
13	4.11	4.76	5.89	7.04	8.63	9.93	12.34
14	4.66	5.37	6.57	7.79	9.47	10.82	13.34
15	5.23	5.98	7.26	8.55	10.31	11.72	14.34

df	Probability under H_0 that $\chi^2 \geq$ chi square						
	.99	.98	.95	.90	.80	.70	.50
16	5.81	6.61	7.96	9.31	11.15	12.62	15.34
17	6.41	7.26	8.67	10.08	12.00	13.53	16.34
18	7.02	7.91	9.39	10.86	12.86	14.44	17.34
19	7.63	8.57	10.12	11.65	13.72	15.36	18.34
20	8.26	9.24	10.85	12.44	14.58	16.27	19.34
21	8.90	9.92	11.59	13.24	15.44	17.18	20.34
22	9.54	10.60	12.34	14.04	16.31	18.10	21.24
23	10.20	11.29	13.09	14.85	17.19	19.02	22.34
24	10.86	11.99	13.85	15.66	18.06	19.94	23.34
25	11.52	12.70	14.61	16.47	18.94	20.87	24.34
26	12.20	13.41	15.38	17.29	19.82	21.79	25.34
27	12.88	14.12	16.15	18.11	20.70	22.72	26.34
28	13.56	14.85	16.93	18.94	21.59	23.65	27.34
29	14.26	15.57	17.71	19.77	22.48	24.58	28.34
30	14.95	16.31	18.49	20.60	23.36	25.51	29.34

[*] Table C is abridged from Table IV of Fisher and Yates: Statistical tables of biological, agricultural, and medical research, published by Oliver and Boyd Ltd., Edinburgh, by permission of the authors and publishers.

APPENDIX

TABLE C. TABLE OF CRITICAL VALUES OF CHI SQUARE*

df	Probability under H_0 that $\chi^2 \geq$ chi square						
	.30	.20	.10	.05	.02	.01	.001
1	1.07	1.64	2.71	3.84	5.41	6.64	10.83
2	2.41	3.22	4.60	5.99	7.82	9.21	13.82
3	3.66	4.64	6.25	7.82	9.84	11.34	16.27
4	4.88	5.99	7.78	9.49	11.61	13.28	18.46
5	6.06	7.29	9.24	11.07	13.39	15.09	20.52
6	7.23	8.56	10.64	12.59	15.03	16.81	22.46
7	8.38	9.80	12.02	14.07	16.62	18.48	24.32
8	9.52	11.03	13.36	15.51	18.17	20.09	26.12
9	10.66	12.24	14.68	16.92	19.68	21.67	27.88
10	11.78	13.44	15.99	18.31	21.16	23.21	29.59
11	12.90	14.63	17.28	19.68	22.62	24.72	31.26
12	14.01	15.81	18.55	21.03	24.05	26.22	32.91
13	14.12	16.98	19.81	22.36	25.47	27.69	34.53
14	16.22	18.15	21.06	23.68	26.87	29.14	36.12
15	17.32	19.31	22.31	25.00	28.26	30.58	37.70

df	Probability under H_0 that $\chi^2 \geq$ chi square						
	.30	.20	.10	.05	.02	.01	.001
16	18.42	20.46	23.54	26.30	29.63	32.00	39.29
17	19.51	21.62	24.77	27.59	31.00	33.41	40.75
18	20.60	22.76	25.99	28.87	32.35	34.80	42.31
19	21.69	23.90	27.20	30.14	33.69	36.19	43.82
20	22.78	25.04	28.41	31.41	35.02	37.57	45.32
21	23.86	26.17	29.62	32.67	36.34	38.93	46.80
22	24.94	27.30	30.81	33.92	37.66	40.20	48.27
23	26.02	28.43	32.01	35.17	38.97	41.64	49.73
24	27.10	29.55	33.20	36.42	40.27	42.98	51.18
25	28.17	30.38	34.38	37.65	41.57	44.31	42.62
26	29.25	31.80	35.56	38.88	42.86	45.64	54.05
27	30.32	32.91	36.74	40.11	44.14	46.96	55.48
28	31.39	34.03	37.92	41.34	45.42	48.28	56.89
29	32.46	35.14	39.09	42.56	46.60	49.15	58.30
30	33.53	36.25	40.26	43.77	47.96	50.89	59.70

* Table C is abridged from Table IV of Fisher and Yates: Statistical tables of biological, agricultural, and medical research, published by Oliver and Boyd Ltd., Edinburgh, by permission of the authors and publishers.